SACRIFICING SOVEREIGNTY: BILATERAL INVESTMENT TREATIES, INTERNATIONAL ARBITRATION, AND THE QUEST FOR CAPITAL

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ABSTRACT

Sacrificing Sovereignty: Bilateral Investment Treaties, International Arbitration, and the Quest for Capital
(Under the direction of Thomas Oatley)

This dissertation examines the phenomenon of bilateral investment treaties, or BITs. Developing countries have increasingly turned to these treaties as a means of offering credible promises to foreign investors of favorable treatment, ostensibly in order to induce greater investment flows. My analysis is three-pronged. First, I argue that only certain kinds of BITs are likely to have much of an effect on investment flows—namely, those that contain binding state pre-consents to investor-initiated arbitration. I present the first comprehensive analysis of the dispute-settlement content of existing treaties. This data-collection effort informs the statistical analyses presented in later chapters. Second, I argue that the willingness of developing countries to enter into BITs should depend in predictable ways on the partisan character of their governing elites. I present results from a large-n statistical analysis that shows that partisanship indeed matters in predicting the likelihood that BITs will be embraced as a mechanism to attract foreign investment. Finally, I present a large-n statistical analysis of the effectiveness of BITs at attracting additional foreign investment. I find very limited evidence that strong BITs are of much use in the so-called "competition for capital". The finding is of great potential significance to developing countries, who have in the past appeared to blindly embrace BITs as a significant part of their development strategies. My results suggest that while BITs may be likely to impose significant sovereignty costs on developing countries, they are unlikely to provide much in the way of off-setting benefits.

DEDICATION

I dedicate this dissertation to Keith Warren Yackee, Ph.D., a model in spite of himself. He is greatly missed.

ACKNOWLEDGEMENTS

This dissertation could not and would not have been completed absent the encouragement and the patient support (and mostly patience!) of a number of people. William Scheureman deserves my sincere thanks for initiating this process, and the product that resulted, when he allowed me many years ago to enroll as a lowly undergraduate in his graduate-level seminar in political theory at the University of Pittsburgh. And though I quickly abandoned political theory as an inquiry of study, his (then-youthful) enthusiasm for teaching and thinking about politics and political science is directly responsible for my decision to enroll in graduate school and, eventually, to complete my degree. Thomas Oatley has also been instrumental in introducing me to the field of international political economy, in rendering it both intellectually tractable and exciting, and in encouraging me to approach its study with caution, modesty, and rigor. Luke Keele's methodological advice, which he has offered unstintingly and often, has also been essential to the completion of this project. I should also acknowledge the financial support of the National Science Foundation, which provided funds to allow the collection and coding of the data on bilateral investment treaties. And Susan Webb Yackee deserves my most heartfelt apologies for her suffering—if that is not too harsh a word—through more years of spousal dissertation angst than she anticipated when she agreed to marry me. Finally, but not least importantly, Ms. Lila Anne Yackee, age three, deserves the most thanks of all for allowing me occasionally over the past two years to type at my laptop computer without having the lid slammed shut on my fingers. To her I owe and promise many more trips to the park, and all of the ice cream she cares to eat.

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CHAPTER ONE

INTRODUCTION

Several years ago the journal *International Organization* (IO) devoted a special issue to the subject of the "legalization" of international relations.[1] By legalization the authors meant that states have increasingly undertaken relatively precise, formal legal obligations toward each other, and that they have increasingly delegated authority to independent and neutral adjudicators to interpret those obligations when disputes as to the obligations' content or application might arise. The special issue was remarkable because for two decades international relations specialists had studiously avoided any significant discussion of the role that "law" as such might meaningfully play in independently and effectively constraining opportunistic state behavior. Now many were saying that "legalization" held substantial promise to promote state compliance with international obligations, furthering mutually beneficial cooperation.

In an important sense the discovery that international law might matter was hardly a discovery at all, but rather a quite logical and long overdue extension of two decades of work making a convincing case that "institutions", variously labeled and distinguished as "regimes", "principles", "norms," "rules", and "decision-making procedures"[2], might render the anarchical world stage a significantly less depressing place to find oneself than scholars of a more "realist" stripe tend to argue.[3] And while the institutionalist literature has traditionally focused on informal "rules of the game", the IO special issue signaled that formal institutions—and law, understood as the black-letter sort, tends to be the among the most formal—might deserve equal billing.

In that original IO discussion the rather specialized realm of international investment law was only briefly and incompletely covered. To the extent that international relations theorists are interested in international law, that interest tends to run most inevitably toward topics of trade, regional integration, and human rights, and the IO special issue reflected that topical bias. Yet ironically it is precisely in the realm of international investment law that the process of legalization is perhaps most advanced. Bilateral investment treaties, or BITs, sit conspicuously at the forefront of the phenomenon. It is this aspect of the phenomenon—the treaty-based legalization of international investment law—that this Article aims most generally to address. For the uninitiated, a BIT is a treaty, generally between two countries (hence "bilateral"), in which each country promises to treat investors from the other country favorably (hence "investment). It is often repeated that the first BIT was a 1959 treaty between Germany and Pakistan. I show below that as a conceptual and factual matter this claim is highly problematic. But it is sufficiently truthful to allow that year to serve as a very rough guide to the start of the BIT era. What is clear is that since that time, and especially since the 1990s, BITs and their close equivalents (such as the investment chapters of multilateral free trade agreements like NAFTA) have multiplied exponentially, or nearly so. For example, UNCTAD calculates that there were less than 100 BITs in 1980; in 1999, there were over 2000.[4]

My precise focus is on the mechanisms by which international law, as codified in BITs and related international legal institutions, might be expected to effectively alter state incentives. Scholars have traditionally distinguished the international legal regime from its domestic counterpart on the "fact"—the quotes indicating some doubt as to whether it is indeed any longer a (meaningful) fact—of the latter's enjoyment of a reliable system for the coercive enforcement of legal obligations. Should I refuse to pay my roofer for re-shingling my roof, he can sue me in state court for breach of contract. Should I refuse to pay the resulting judgment, he can summon the county marshal to seize my Toyota Camry, or seek a court order having my (meager) professorial wages garnisheed. Quite frequently, on the international legal plane relations are subject to no sort of obligatory, binding judicial review of the

adequacy of performance. And even when they are (as, say, by the International Court of Justice), resulting judgments are not directly enforceable, because there is no international equivalent of the county marshal empowered to impose meaningful penalties for continued intransigence. This has led international law scholars to emphasize that international law typically matters only where an international legal obligation is "self-enforcing."[5] And self-enforcement is said to be most likely where breaking an international law reliably leads to "reputation costs" in the eyes of those observing the breach, and typically in the eyes of the party directly privy to the agreement.[6]

Less fully recognized is how out of date the traditional distinction between domestic and international legal systems has become in the realm of international investment law. BITs today routinely contain arbitration agreements in which states agree to allow foreign investors from the other state party to the treaty to sue for breaches of international investment law before international arbitral tribunals. And most importantly, many international investment arbitral awards are readily and coercively enforceable through domestic legal systems thanks to a network of international treaties that oblige domestic courts to recognize and enforce awards, even those rendered against states, in much the same manner as they recognize and enforce the judgments of other domestic courts.

What this means for theory is that BITs provide us with a valuable means of testing the effects of different enforcement mechanisms on compliance with international law. While the casual observer of the law might understandably assume that stronger (e.g. more coercive) enforcement mechanisms are better at promoting compliance (and thus at rendering international law effective), recent work in contract law has emphasized that there may be trade-offs of a negative sort when self-enforcing arrangements are transformed into coercively enforced ones.[7] For example, in self-enforcing agreements the parties to the agreement, if they wish to continue to enjoy the gains from cooperating, have an incentive to work things out by informally altering their agreements to suit unforeseen changing conditions. This suggests that self-enforcing agreements, in which reputation plays an important role in

promoting (and even in redefining) compliance on the fly, have the potentially salutary benefit of promoting relational flexibility, even if they make compliance with the original terms of the agreement somewhat less likely.

On the other hand, coercively enforced agreements, especially where coercive enforcement may be initiated by a non-party to the original agreement, may promote strict compliance with the original terms of the agreement, but they may do so at the cost of increasing the rigidity of the relationship, and thus at encouraging breakdown (and litigation) rather than cooperative adjustment, even when cooperative adjustment may be much preferred by the original contractual parties. This is particularly a danger with BITs, which are inter*state* agreements which nonetheless often allow and encourage private parties (foreign investors) to police compliance with the original terms of the agreement through coercively enforceable international arbitration. In more practical terms, the danger is that investors may successfully seek too much strict compliance, with "too much" compared against the yardstick of what the state parties to a particular BIT would have wanted, or to what reputational concerns alone would have adequately encouraged.

The difficult task, then, is determining when non-coercive enforcement of international law might be good enough (or perhaps even preferred), given its ability to promote a measure of compliance along with a measure of relational flexibility. This is a question closely related to the growing literature on the "optimal design of treaties,"[8] but it is also one that has so far largely defied empirical testing beyond a handful of clumsily constructed empirical examinations in the law review literature.[9] BITs provide a fertile testing ground because not all BITs contain coercive enforcement arrangements. Furthermore, there are a number of BIT-equivalent international legal instruments (such as association agreements between the European Union and applicant countries, as well as various "declarations" by the OECD) that make very BIT-like promises to investors but rely exclusively on self-enforcement to promote compliance. Roughly speaking (but in actuality using the powerful tools of modern econometrics) we can

look at whether BITs of one type are better at promoting compliance with international investment law than the other.

This simplistic description of the task at hand hides difficult conceptual questions, perhaps most importantly the question of how to measure "compliance," especially when the meaning of compliance might be said to change in conjunction with the changing terms of a given relationship. The answer is to look not at compliance directly (even if this were possible), but to look at the behavior of interested parties who can be trusted to evidence, by that behavior, their own views of whether something resembling compliance with international law is to be expected. Less cryptically put, we can examine whether international legal promises to foreign investors vary in their apparent ability to change investor attitudes about the desirability of investing in particular countries. We can examine those attitudes by looking at whether foreign investors tend to actually invest more in countries that have made coercively enforceable promises to treat investors favorably compared to those that have made no such promises, or to those that have made promises supported only by the host country's good word.

We can also extend the analysis a bit further afield to examine whether explicit, legalized promises are necessarily more effective than promises of a much more implicit and informal sort. For example, Slaughter's and Moravcsik's influential "liberal" theories of international law and of state preference formation suggest that liberal democracies are more likely to uphold their international legal obligations than are other types of regimes.[10] And both Jensen and Li have shown that democracies seem to perform better at attracting foreign investment than autocracies, suggesting that investors indeed view democracies as more likely to treat them "fairly and equitably", as customary international law is said to require.[11] We can begin to disentangle the effects of the implicit and largely non-enforceable promises inherent in a regime's type from more explicit and more enforceable promises embodied in many BITs by examining whether the apparent empirical relationship between democracy and foreign investment

continues to hold once we take account of the presence of more self-consciously legal promises made to investors.

This dissertation's contribution can be briefly summarized *en gros*: it attempts to take seriously recent contentions that international law "matters" by changing the incentives that states face, and thus that it can effectively constrain state behavior. But unlike the work of international law optimists, like Slaughter, who argue that international law should be taken seriously primarily because of the internationalized process that generates the law,[12] I argue that it is just as important, and probably more so, to take seriously differences in the formal content of international legal promises. Where international legal promises are accompanied by coercive enforcement mechanisms, it is reasonable to assume that compliance and its tangible benefits will generally increase as well. But if compliance does not increase by much, or if the expected benefits of compliance do not adequately materialize, then it also becomes reasonable to question whether the recent trend of including coercive dispute settlement provisions in investment treaties and other international legal instruments is necessarily worth the costs that such provisions generally entail.

That BITs entail costs is becoming increasingly clear. BITs can force states to abandon popular policy initiatives in the face of legal threats from foreign investors, or to reimburse investors for "damages" from policy actions, even when the policies are objectively necessary, and even when domestic businesses are not equally entitled to redress.[13] They can also lead to serious political backlash if citizens view the treaties as unfairly favoring foreigners and perceive treaty-based arbitral awards as illegitimate intrusions on sovereignty.[14] Argentina provides the most striking recent example of the potential costs of BITs. In the wake of that country's decision to float the Argentine peso in 2002 (a decision that in many respects seems clearly to have been one of "necessity" in the legal sense, and, as a practical matter, economically unavoidable) foreign companies filed more than 30 arbitral claims against Argentina, collectively seeking hundreds of millions of dollars in damages.[15] These claims have so far

met with some measure of legal success.[16] And in South Africa, the government's "Black Economic Empowerment" regime has been challenged by an Italian mining company, which claims that the regime violates South Africa's BIT-based promises to avoid uncompensated expropriation, discrimination, and just and fair treatment. This has raised the fear that investment treaties may prevent, or make it prohibitively costly for, South Africa to effectively redress the lingering economic inequities of the apartheid era. More generally, a recent informal survey of 23 investment treaty awards over the past 16 years suggests that international arbitral tribunals have awarded investors nearly two billion dollars, not including interest and attorneys fees.[17] These published awards and proceedings undoubtedly represent only the tip of a presumably large iceberg's worth of host state policy proposals and actions that have been withdrawn or reversed under investor threat of international litigation.

The implications of the present analysis are thus of potentially great practical importance. As international relations become more legalized, there is a correspondingly greater need to ensure that states do indeed adopt treaties of the "optimal" sort sooner rather than later. Muddling one's way to optimality is markedly less desirable than landing in an optimal spot on the first step. Too many developing countries have blindly embraced the international legalization of their relationships with foreign investors without much evidence that legalization is all that beneficial or necessary, let alone optimal. This dissertation tries to fill that gap by suggesting whether, and in what forms, it might be.

The analysis proceeds as follows. Chapter Two reviews the history and logic of BITs, and presents the results of a descriptive exercise that attempts to classify BITs on the basis of the strength of their dispute settlement mechanisms. This classification forms the empirical basis of the statistical analyses presented in later chapters. Chapter Three develops and tests a partisan theory of BIT acceptance. I show that leftist governments have historically been more averse than non-left governments to adopting strong BITs, but that by the 1990s this traditional (and expected) pattern had reversed as leftist government ideas about the relative value of BITs and of FDI changed. Chapter Four

moves on to begin to address the question of whether BITs are effective at attracting FDI. The Chapter focuses in particular on replicating (and critiquing) the most prominent extant study of BIT effectiveness, which claims to provide robust evidence that BITs lead to massive increases in FDI inflows. Chapter Five extends the analysis of Chapter Four by presenting a statistical analysis of an original model of BIT effectiveness that shows that while BITs might have been effective at attracting FDI in an earlier era, there is very little evidence that they retain any significant ability to meaningfully influence investor decisions. Chapter Six concludes.

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[1] Published in book form as JUDITH L. GOLDSTEIN ET AL., EDS. LEGALIZATION AND WORLD POLITICS (2001).

[2] STEPHEN D. KRASNER, STRUCTURAL CAUSES AND REGIME CONSEQUENCES.

[3] Arend makes this point well. ANTHONY CLARK AREND, LEGAL RULES AND INTERNATIONAL SOCIETY ch. 4 (1999).

[4] *See* UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS [UNCTC], BILATERAL INVESTMENT TREATIES (1988); UNCTAD, BILATERAL INVESTMENT TREATIES IN THE MID-1990S (1998); UNCTAD, BILATERAL INVESTMENT TREATIES 1959-1999, UNCTAD/ITE/IIA/2 (2000).

[5]Beth V. Yarbrough & Robert M. Yarbrough, *Reciprocity, Bilateralism, and Economic 'Hostages': Self-Enforcing Agreements in International Trade*, 30 INT'L STUD. Q. 7 (1986); Robert E. Scott & Paul B. Stephan, *Self-Enforcing International Agreements and the Limits of Coercion.* 2004 WIS. L. REV. 551 (2004).

[6] Andrew Guzman, *A Compliance-Based Theory of International Law*. 90 CAL. L. REV. 1823 (2002).

[7] Scott & Stephan, *supra* note 5.

[8] *See generally* ROBERT E. SCOTT & PAUL B. STEPHAN. THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW (2006).

[9] *See, e.g.*, Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1 (2005).

[10] *See* Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EURO. J. INT'L L. 503 (1995); Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513 (1997).

[11] Nathan Jensen, *Democratic Governance and Multinational Corporations: Political Regimes and Inflows of Foreign Direct Investment*, 57 INT'L ORG. 587 (2003); Quan Li, *Democracy, Autocracy, and Tax Incentives to Foreign Direct Investors: A Cross-National Analysis*, 68 J. POL. 62 (2006).

[12] ANNE-MARIE SLAUGHTER. A NEW WORLD ORDER (2005). See also Guzman, *supra* note 6, who suggests that states face greater reputational incentives to comply with international legal obligations precisely because of their international nature.

[13] *See, e.g.*, Vicki Been and Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protection and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 55 (2003).

[14] The danger of political backlash is well-illustrated in the Bill Moyers PBS television special "Trading Democracy" (Feb. 1, 2002), which harshly criticizes NAFTA's foreign investment framework.

[15] Jürgen Kurtz, "Investment Claims—First Lessons from Argentina" *in* INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW (Weiler, ed. 2005).

[16] *See, e.g.* LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic (ICSID Case No. ARB/02/1).

[17] Federico Ortino, email posted to the Oil-Gas-Energy-Mining-Infrastructure Dispute Management (OGEMID) listserv, Sept. 4, 2006.

CHAPTER TWO

THE HISTORY & LOGIC OF BITS

§ 2.1: Introduction

Developing countries have historically viewed foreign investment with deep ambivalence. As William L. Thorp, a United States Assistant Secretary of State, observed in 1948:

> As engineers and technicians we are more than welcome; our skills are eagerly sought; but as businessmen, as entrepreneurs, we are often not so welcome. Sometimes we feel that at the same moment that our capital is sought, every obstacle is being put in the way of its use on a fair and equitable basis.
>
> Among the many complex reasons for this attitude is the feeling that the foreign investor is an 'exploiter and not a contributor, that his interest is not in the local welfare, that his allegiance is to a distant stockholder, and that when he has won the highest return possible he and his enterprise will withdraw.[1]

The history of developing country policies toward foreign investors reflects this ambivalence. They seek, on the one hand, to encourage the "right kinds" of foreign investment while also attempting to maintain the ability to "control" it, to subjugate it to national development or regulatory priorities.

The level of ambivalence ebbs and flows with time, of course. In some eras, where ambivalence shades into hostility, developing countries may emphasize subjugation over encouragement. In other eras, where ambivalence shades into affection, systems of control may be dismantled in order to attract more investment through an improved "investment climate." In this current era of seemingly relentless FDI promotion, FDI competition, and, perhaps not coincidentally, increasingly massive foreign capital flows, the idea of host state ambivalence toward foreign investment must seem rather strange. But not so

long ago ambivalence, if not outright hostility, was the norm rather than the exception. After World War II, and especially by the 1960s and early 1970s, analysts and policymakers in the Third World, and their sympathizers in the First, had pushed Argentine economist Raul Prebisch's ideas about the plight of the economic "periphery" into a reasonably coherent set of propositions about the "dependency" of the Third World on the First. One of the chief villains in *dependencia* thought was the multinational corporation, whose investments, if left unchecked, would perpetuate a "world system" in which the Third World would remain exploited and immiserated. The overall mood was such that, by 1974, C. Fred Bergsten could plausibly claim that

> Virtually every country in the world... is levying increasingly stringent requirements on foreign firms... Few countries ask any longer the simplistic question: 'Do we want foreign investment?' The issue is how to get foreign investment on the terms which are best for them, and indeed how to use the power of the firms to promote their own national goals.[2]

Bergsten went on to warn, not so accurately it turned out, that then-current ideas about the proper role of foreign investors in national development strategies would lead to "investment wars" in which host states would increasingly regulate and limit the activities of multinational corporations.[3]

Like most grandiose predictions, Bergsten's was quite wrong. What is so surprising is how quickly it was wrong. By the early 1980s developing and developed countries alike were having serious second thoughts about the wisdom of restricting and controlling foreign investment. In a 1985 article, Encarnation and Wells documented the rise of "competition" for foreign investment among developing countries, in which the focus was increasingly on offering investment "incentives" rather than on imposing investment controls.[4] And indeed, over the following years many developing countries began dismantling the elaborate systems of national control of foreign investment that had been painstakingly and painfully erected just a few years before.

Either causally or coincidentally, the volume of worldwide foreign direct investment flows has increased by tremendous leaps and bounds. The following two Figures illustrate the trend. In real terms, and as of the year 2000, the worldwide annual volume of FDI inflows has increased by a factor of nearly 48 from its 1970 level.

Figure 2.1: Annual FDI Inflows, World vs. LDC

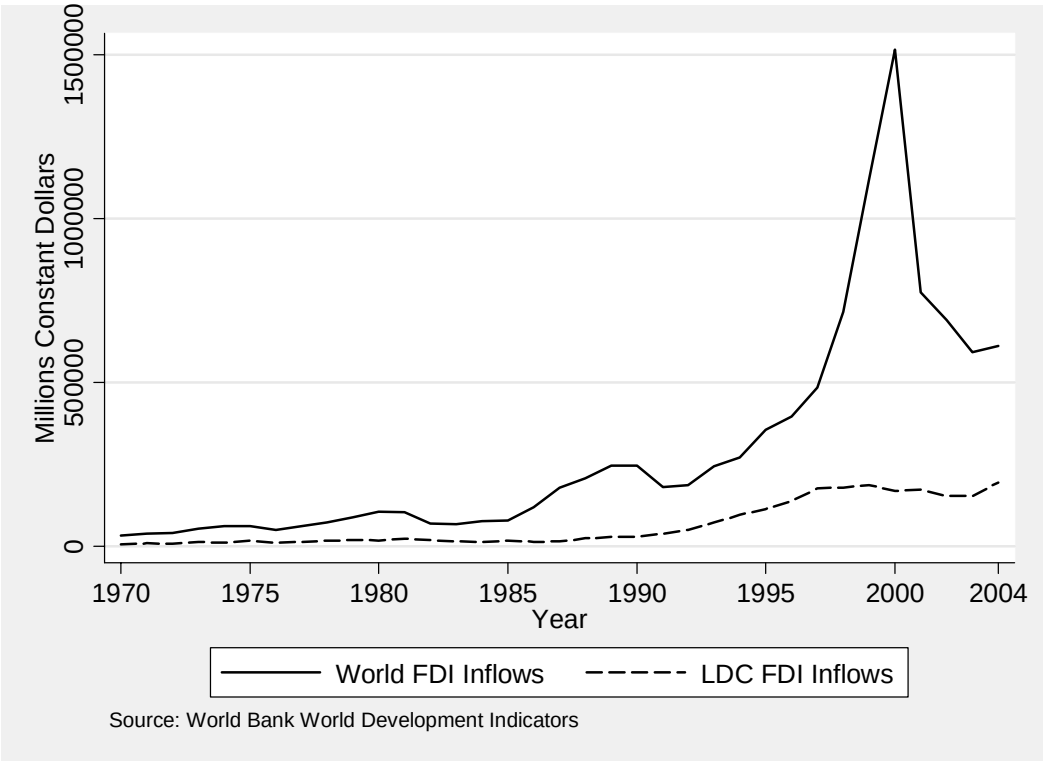
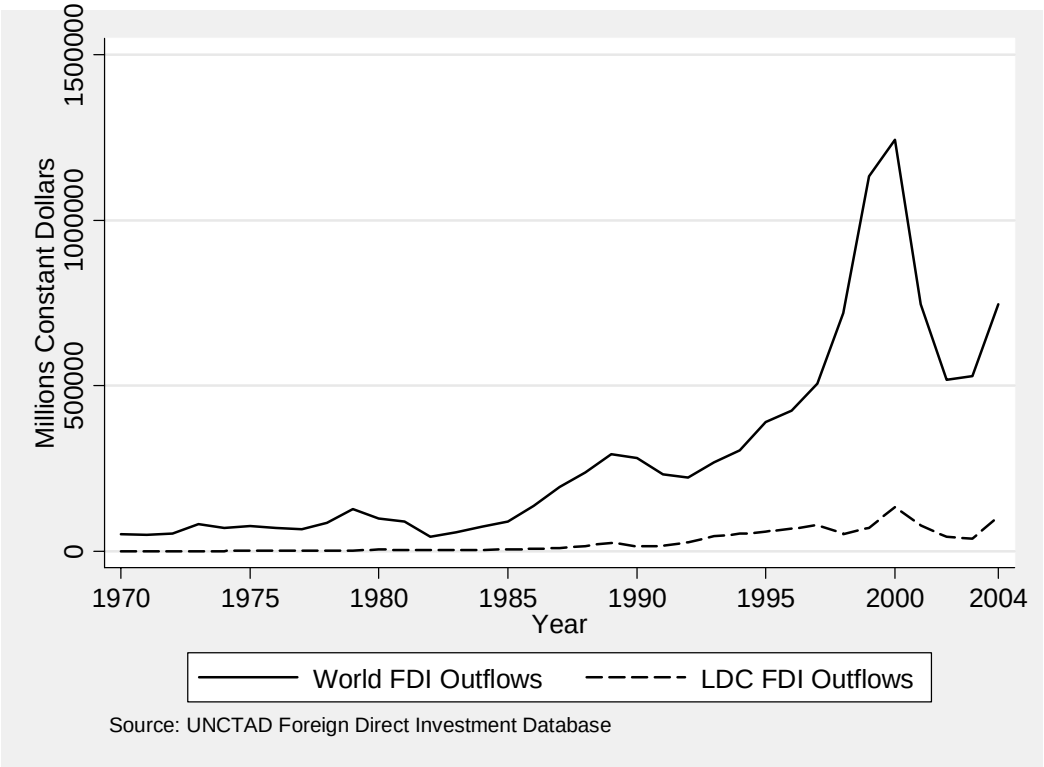


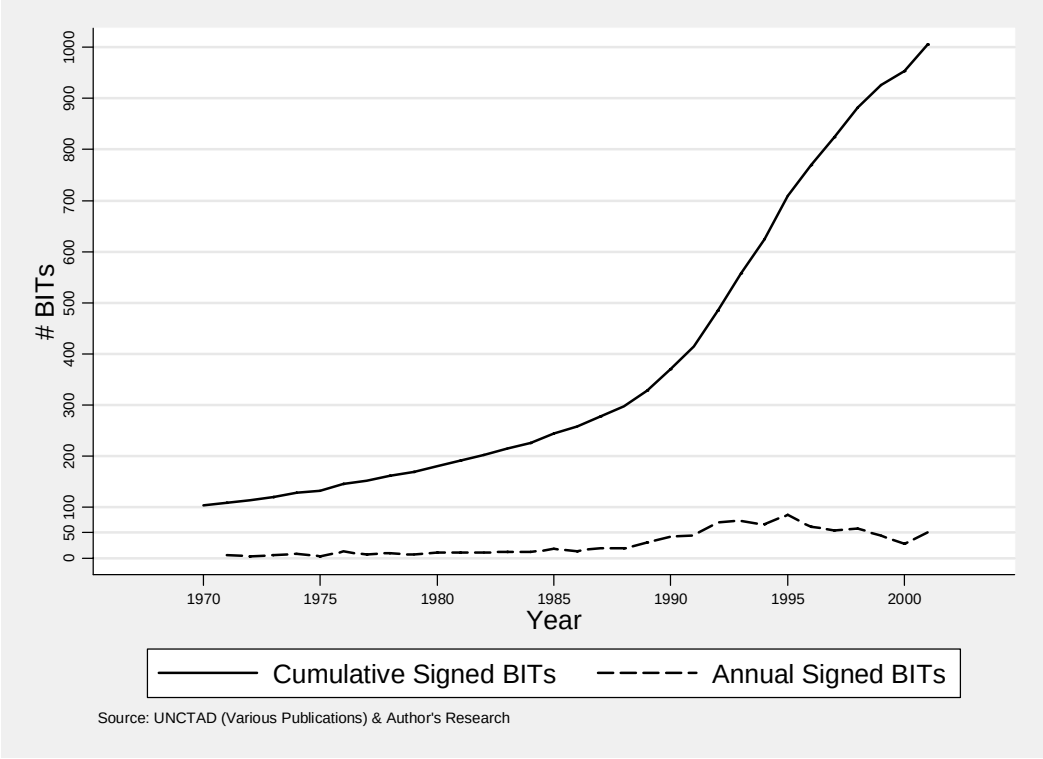
Figure 2.2: Annual FDI Outflows, World vs. LDC



The Figures taken together illustrate the well-observed fact that the vast majority of FDI takes place between the world's richest countries, with relatively little going to the developing world, and hardly any originating from it. (The apparent difference in total volume of world inflows illustrated in Figure 2.1 and world outflows in Figure 2.2 is an artifact of the fact that Figure 2.1 relies on statistics compiled by the World Bank, while Figure 2.2 relies on statistics compiled by UNCTAD). For example, over the 1990s approximately ¼ of total world FDI inflows went to less-developed countries, or LDCs, with the rest going to (and an even higher percentage coming from) the developed world. But in absolute terms the increase in FDI flows to LDCs remains quite impressive. For example, annual inflows to LDCs increased by a factor of almost 18 over the period 1970-2000.[5]

From a formal policy perspective, the most observable and in some ways the most striking aspect of the widespread change of heart regarding the value of FDI has been the diffusion of bilateral investment treaties as an important means of attracting foreign capital. The solid line in Figure 2.03, below, shows the cumulative number of new BITs signed over the years 1970s-2001. The dashed line shows the numbed of new BITs signed annually. I discuss the mechanics of counting BITs in much more detail in the following Sections of this Chapter, but for the moment I should point out that the count illustrated below includes only those BITs signed between the top 18 capital-exporting countries (the United States, France, and so on) and the remaining capital-importing countries. If we were to include investment treaties signed between pairs of capital-importing countries, the count would be approximately twice as high.[6]

Figure 2.3: Cumulative and Annual Count of BITs Signed between Major Capital-Exporting and Capital-Importing Countries, 1970-2001



At least since Fatorous's exceptionally useful 1962 study of "Government Guarantees to Foreign Investors",[7] it has been suggested that the primary problem facing would-be foreign investors is the problem of effectively guaranteeing the investor that the host state will not act opportunistically once the investment has been sunk. This problem has been described as one of "obsolescing bargain" in the business-school literature of the 1970s,[8] and as one of "credible commitment" in the transaction-cost-economics literature of the 1980s, which is most closely associated with Williamson.[9] It is not simply a problem for foreign investors. It is also a problem for host states that desire foreign investment. The host state that is unable to convince investors that it will not unduly interfere with the investment's profitability post-establishment will presumably be denied needed investment, or will have to pay a risk premium for it. It is widely argued that BITs are appropriate and potentially quite effective solutions to the obsolescing bargain/credible commitment problem because they allow developing countries to use international law to make more credible promises that their "bargains" with foreign investors will not obsolesce. This is the standard story, and it is one that is widely echoed by analysts interested in explaining why states sign BITs,[10] by those interested in exploring whether BITs succeed in encouraging foreign direct investment (FDI),[11] and by those interested in studying the doctrinal evolution of BITs.[12]

In the Sections that follow I make two principle claims. First, I argue that while some BITs have the meaningful potential to act as credible commitment devices, they are not *uniform* in their ability to do so. In particular, BITs that lack guaranteed access to investor-initiated arbitration have little theoretical potential to meaningfully circumscribe host state incentives to treat investors poorly. Second, I argue that BITs are by no means *unique* in their ability, such as it is, to function as effective credible commitment devices. BITs are typically assumed to fill a large hole in the international institutional infrastructure, broadly construed, that protects investors. In fact, and as I show, investors and investment-seeking states have long had the ability, through alternative informal and formal means, to reasonably secure the property rights of foreign investors. BITs add very little to what was already on the "credible commitment" table, and as such we should be very suspicious of theoretical claims that BITs will

necessarily lead to great rather than marginal increases in investor confidence and, ultimately, in investment flows.

I make these claims within the context of an extended critique of the tendency of empirical BIT scholars to uncritically rely on a list of BITs drawn up by UNCTAD. UNCTAD has long taken a role in promoting BITs, and in the year 2000 the organization published what was intended to be a comprehensive, chronological listing of the treaties, updating two earlier such compendia.[13] The central thrust of my critique is that the persuasiveness—or what might be called the internal validity—of empirical tests of the credible commitment thesis necessarily depends in significant part on whether the analysts (and by direct implication, UNCTAD) have accurately and comprehensively identified the relevant instances of "credible commitment" that are theoretically likely to provide the particular host state involved with a competitive advantage at attracting foreign capital. The argument is modest, but not unimportant. Quasi-experimental statistical studies of investment treaties are by design intended to confirm or disconfirm theoretical expectations through the identification of empirical correlations between key variables. As the old saw goes, correlation does not equal causation, and whether the former really does confirm the latter depends in part on the internal validity of the particular study, and particularly on the study's measurements of the underlying theoretical concepts. In other words, a study may be usefully described as internally valid if we can have confidence that the researcher has isolated the true cause of any observed correlation.[14] Whether confidence is warranted depends in turn on whether the study's measurement techniques are accurate in the sense of correctly identifying the phenomena of theoretical interest, and complete in the sense of controlling for plausible alternative explanations.[15] Of course, whether a particular study of BITs is internally valid necessarily depends on what the study is attempting to explain, and it is perfectly conceivable that UNCTAD's list of BITs might be appropriate or adequate for certain research questions. But for the research questions that most BIT analysts seem interested in asking, the list is problematic. I conclude, in short, that BIT analysts need to do a much better job then they have so far done of convincingly "linking [their] abstract concepts to empirical

indicators" of those concepts.[16] Until they do, credible commitment stories of the causes and consequences of BITs will remain far less persuasive than it otherwise might be.

§ 2.2 BITs and Self-Enforcement

BITs are typically understood, most basically, as serving two functions. On the one hand, the treaties provide states with a means of making what might be called "substantive" promises to treat investors well. On the other hand, they can provide states with a means of making those substantive promises more credible. One of the first conceptual concerns of any BIT analyst should be whether the treaties identified by UNCTAD are sufficiently similar in terms of both the favorableness of the substantive promises extended to investors *and* the credibility of those promises. The potential value of a given treaty to an investor will naturally depend on the values taken by these two logically separate parameters. A treaty that advances wholly credible but relatively stingy substantive promises is not necessarily more valuable to the investor than less credible promises of significantly more favorable treatment.

BIT analysts commonly assume that the treaties' substantive promises are indeed equivalently favorable, and that these equally favorable promises are identically credible. The first assumption is, with one major exception, not an entirely unreasonable one. The second assumption can be highly problematic.

Most BITs mimic, at least in broad strokes, the OECD's 1967 Draft Convention on the Protection of Foreign Property, and the language used and the subjects covered in the various treaties can appear remarkably similar, both over time and across countries. For example, capital exporting states have long been "preoccup[ied]" with convincing host states to provide certain generally applicable standards of treatment for established investments.[17] BITs accordingly, and largely to a tee, promise that

investors shall be "treated" in any number of imperfectly distinguishable ways. The most common examples include promises of "non-discriminatory" treatment; treatment that is not "unreasonable" or "arbitrary"; "fair and equitable" treatment; treatment including "full protection and security"; treatment as favorable as provided to domestic investors ("national treatment"); and "most-favored-nation" (MFN) treatment. Investors have also long been concerned with maintaining their ability to repatriate investment proceeds out of the host country, and with receiving compensation in the event that their property is expropriated. Most BITs unsurprisingly contain somewhat more specific guarantees as to both subjects.

This set of promises form what might usefully be called the "substantive core" of modern BITs, and they are what begin to make it possible to analyze the treaties as a conceptually cohesive group. That task is made easier by the widespread promise of MFN treatment. A promise of MFN treatment means that when a host state offers more favorable substantive promises to investors in a later BIT, those more favorable promises will automatically apply to investors covered by the first, less favorable BIT. The ubiquity of the MFN clause also makes it a largely useless and virtually impossible task for the analyst to construct any sort of index of the relative substantive favorableness of the various treaties, just as it can make it rather difficult for an investor to determine just what exactly he has been promised.[18]

United States BITs provide the principle exception to this general rule of substantive sameness. The point is a small one, and tangential to the larger argument, but it is worth emphasizing that U.S. BITs, unlike the BITs of other capital-exporting countries, consistently extend promises of favorable treatment to investors at the "pre-establishment" stage of the investment process.[19] Generally, this means that host states that enter into BITs with the U.S. promise to allow investors to enter the country and make an investment under the same procedures and on the same terms as domestic investors—a significant relinquishment of a host state's well-recognized (and for much of history jealously guarded) sovereign right to exert largely absolute control over the entry of foreigners. And because promises of

MFN treatment usually apply only to post-establishment phases of the investment process, this particularly liberal aspect of the U.S. treaties is not incorporated by reference into the treaties of other capital-exporting countries. Analysts, and especially those interested in the effects of BITs on FDI flows, will necessarily have to adjust the conceptual "weight" of the value of signing or ratifying a U.S. BIT versus signing or ratifying a BIT with another state. Signing a U.S. bit represents a substantively different commitment than signing a BIT with a European capital-exporting state.

The larger point, however, is that BIT promises, even if we assume them to be equally favorable, are *not* equally credible. To see why, note that the idea that BITs have the capacity to function as credible commitment devices implies that something about the treaties makes it particularly unattractive—e.g. costly – for states to renege on favorable promises to investors. It has long been argued that in some instances treaty-based promises may be "self-enforcing" in the sense that a breach of the treaty will lead "automatically" or nearly so to the imposition of significant costs on the breaching state.[20] In most cases those costs will be of the reputational sort.[21] Third parties will observe the breach and update their beliefs about the breaching state's willingness to honor its commitments. In the case of foreign investment, the host state that breaches an investment treaty can expect perceptions of its investment climate to worsen, making it more difficult for the state to attract desired investment in the future. The prudent host state will thus weigh the short-term benefits of breaching the treaty (say, for example, the domestic political benefits of seizing a foreign-owned mining operation) against the long-term costs of forgone future foreign capital.

It is very difficult to argue, however, that the substantive promises contained in BITs are meaningfully self-enforcing. The difficulty arises from the fact that these core substantive promises are extended as relatively vague standards, and what the promises of favorable treatment actually mean or how they will apply in a given instance can be highly uncertain. This is particularly the case for the treaties' generally applicable standards of treatment, which have been described as "otiose" and "vague

and open to different interpretations"[22] or as "offer[ing only] a general point of departure in formulating an argument that the foreign investor has not been well treated."[23]

Even where the promise is relatively specific, such that in theory an observer might be able to tell with a reasonable degree of confidence and without too much effort that if fact "X" has occurred then promise "Y" will have been breached, whether fact "X" has indeed occurred will often be both highly contestable and highly contested. For example, the common guarantee of "prompt, adequate, and effective" compensation in the event of expropriation can be surprisingly difficult to implement to particular facts.[24] And hiding behind even that modestly specific rule of law lurk immensely important legal questions, such as the proper application of expropriation law to "normal" government regulatory activity. That particular question is left almost completely unaddressed in most treaties and remains far from settled theoretically or jurisprudentially, creating enormous legal uncertainty and fostering a growing political backlash against investment treaties.[25]

This means that in most foreign investment disputes, save the most obvious and egregious, it will be quite difficult for the parties to the dispute or for outside observers to determine whether or not a breach of a given promise has objectively occurred. It is even difficult for international arbitral *tribunals* to consistently construe and apply BIT promises.[26] And where a breach is not easily identified either because of legal or factual uncertainty, reputational concerns are unlikely to dissuade the state from acting in ways that might objectively be considered contrary to its treaty or other international legal promises.[27] The investor, of course, is sure to *claim* the treaty has been violated, but the investor's self-serving rhetoric, like the host state's own, should not be counted upon to reflect the true state of affairs, especially where it simply isn't certain what a particular promise actually means.[28]

It is worthwhile to briefly address in the current context Guzman's more general argument (though one that he has also applied specifically to international investment law) that treaties are "[t]he

most formal and reliable international commitment" in large part because they "represent clear and well-defined obligations of states."[29] The real question is "in comparison to what", and the "what" in Guzman's analysis is, for the most part, customary international law. It would be misguided to argue that BITs offer no improvement over customary international in terms of what might be called the "international legal coverage" of investment issues. BITs typically contain many promises that simply have never been incorporated (or never claimed to have been incorporated) into customary international law: promises to permit investors to transfer funds out of the host country, promises of MFN treatment, promises to recognize the subrogation rights of home states, promises to restrain from imposing performance requirements on investors, and so on. But in an absolute sense, and as I have already argued, these additional promises are typically framed in language that is far from clear and precise. And in a relative sense, it is quite difficult to argue that customary law was *less* clear. Indeed, it is perfectly clear that custom has nothing to say on these topics, and that whatever obligations might exist would necessarily have to derive from other sources, such as municipal law or investment contracts.

Even where BITs *do* treat topics traditionally covered by customary international law (such as expropriation), the treaties typically add little in the way of meaningful additional content, clarity, or precision. Indeed, the United States argues that the most important treaty promises, such as those requiring "prompt, adequate, and effective" compensation or those requiring "fair and equitable" treatment or "full protection and security", merely incorporate by reference the same protections that were already available under custom.[30] The position is not unreasonable. UNCTAD agrees that "[m]ost [BITs] tend to restate traditional principles of customary international law with respect to the treatment of foreign property abroad."[31]

The fundamental issue, then, is one of distinguishing between the existence of an obligation and its clarity of meaning or application. BITs certainly commit host states to *something*. That something appears to be largely investor-friendly, but what exactly the obligation will entail in particular cases can be

quite obscure. For that reason, it is not theoretically plausible to consider investment treaties' core substantive promises to be meaningfully "credible" in and of themselves. Indeed, there is good reason to suspect that investment treaties, by making broad and vague promises to indiscriminate classes of investors, may make disputes even more likely.

§ 2.3 BITs, Credible Commitment, and the Role of Arbitration

What is theoretically necessary to render BIT promises meaningfully credible is investor access to authoritative adjudication. As North has argued, effective institutional solutions to the credible commitment problem entail "not only creating the formal rules but creating and implementing a judicial system that will impartially enforce such rules."[32] It is through adjudication that vague standards of treatment are given useful legal content,[33] and that inevitable factual disputes are resolved. And access to international *arbitration*, as opposed to access to municipal courts in the host state, is essential because investors typically assume that municipal courts in developing countries will lack the technical competence or neutrality to adequately and fairly resolve investment disputes.[34] Wälde's recent and quite forceful statement of the point is worth quoting at length:

> It is the ability to access a tribunal outside the sway of the Host State which is the principal advantage of a modern investment treaty. This advantage is much more significant than the applicability to the dispute of substantive international law rules. *The remedy trumps in terms of practical effectiveness the definition of the right.*
>
> …
>
> The effectiveness of substantive rights is everywhere – but nowhere more so than in investment disputes – linked to the availability of an effective enforcement (i.e. independent) enforcement procedure. This link is so close that the best way to emasculate an investor's right against a host State is to sever the link between an international-law-based right and an international enforcement procedure and to compel the investor to seek justice before domestic courts. *Right and procedural remedy are, in practical and effective terms, one.*[35]

The benefits of authoritative interpretation are twofold. Most immediately, an investor in possession of a favorable international arbitral award has the very real ability to enforce the terms of the award *even in the*

face of continued host-state resistance. This is because a network of important international treaties, including most prominently the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), empower investors to seek award enforcement against host state property located in third-party states.[36] For example, the New York Convention requires the courts of contracting states to enforce international arbitral awards unless one of several relatively strict conditions are met. The New York Convention currently has well over 100 member-states and is widely viewed as the most successful treaty of its kind, as it has encouraged national courts to give far greater deference to international arbitral awards than they did in the past. The ICSID Convention creates a specialized international arbitral institution, situated within the World Bank and designed exclusively to mediate and decide investment disputes between foreign investors and host states. The ICSID Convention currently has over 150 signatories, and the terms of the Convention obligate the domestic courts of those contracting states to enforce ICSID awards as if they were final judgments by a domestic court, with no possibility of collateral attack. These treaty-based judgment-enforcement provisions are far from worthless. To cite just one recent example, a German investor who won an investment treaty award against the Russian government has been able to enforce the award by seizing "a $40 million Russian-owned apartment complex in Cologne that once served as the local KGB outpost."[37]

More abstractly, but perhaps even more importantly, authoritative, impartial arbitration awards have the tremendous potential to increase the reputation costs of the host state's breach by publicly clarifying both the facts surrounding the dispute and the content of the relevant legal rules, and by applying those facts to the rules. While it is true that most arbitral awards are "confidential" in the sense that they are not regularly published by the tribunals themselves, there is a very real possibility that an investor possessing a favorable award will circulate it widely among his fellow investors in the event that the host state attempts to avoid respecting it.

The problem for BIT analysts is that not all BITs provide access to international arbitration, or provide it comprehensively, or provide it with absolute certainty. These extremely important differences in "procedural" (or perhaps more properly "remedial") content suggest that BITs, as potential credible commitment devices, are *not* created equal, and that some treaties are likely to have far less value to investors than others.

Let me add an important caveat. The basic argument—that procedural distinctions matter conceptually—is premised on the assumption that an MFN clause in a investment treaty that does not contain an effective, comprehensive pre-consent to arbitration cannot be used to take advantage of a pre-consent provided in another treaty. This is admittedly a "delicate" question currently subject to substantial debate[38], but the limited jurisprudence on the issue suggests that arbitral tribunals are very unlikely to premise jurisdiction on an MFN clause where the treaty otherwise provides the investor with no right to unilaterally initiate arbitration as to the particular dispute at hand.[39]

Figure 2.4, below, illustrates the results of a comprehensive analysis of the investor-state dispute settlement provisions (or lack thereof) in the BITs or BIT-like FCNs of 18 of the most important capital-exporting states: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Italy, Japan, Netherlands, Norway, Singapore, Spain, Sweden, Switzerland, the United Kingdom, and the United States. Historically these states have supplied between 84 and 99 percent of annual world FDI flows over the past 30-some years.[40] (The numbers are for the years 1993 and 1970 respectively). And when share of FDI outflows is considered on an annual basis, the identity of the top countries remains remarkably stable; only those countries at the very bottom of the ranking, such as Austria, tend to fall in or out of the top 18 in any given year.

I obtained full-text copies of the various treaties, and where possible I evaluated each treaty's content in its official language or as professionally translated by the United Nations. Where a treaty was

available only in a language which I do not read (in nearly all cases Italian or German) I had a native speaker evaluate or translate the relevant passages. Drawing heavily on Schreuer's authoritative discussion of the topic,[41] I placed each treaty each of the four categories described immediately below. The texts of many of the treaties are available on either on UNCTAD's website or in the Oceana Publications Inc. looseleaf series "Investment Treaties." But neither source independently or jointly provides a universally comprehensive selection of treaties. Where a treaty was not available in either source, I was typically able to locate a copy by contacting the relevant home country foreign ministry. But in seven instances I was unable to obtain a full text of the relevant treaty, despite repeated contacts with the appropriate foreign officials. In each of these seven cases I evaluated the treaty as containing an effective and comprehensive pre-consent based on each treaty partner's contemporaneous BIT practice, though in truth the evaluation is at best an educated guess. The full texts of investment treaties between pairs of developing countries are available on a very spotty basis. It is mainly for that reason that I do not include developing country BITs in this Dissertation's analysis.

I should also caution that I only code the dispute settlement provisions of treaties that have entered into force, and that the statistical analyses that follow in later chapters also rely primarily on treaties that are in force and not merely signed. This focus contrasts with the overriding tendency of most other empirical BIT analysts, who count the presence or absence of BITs on the basis of dates of signature rather than dates of entry into force, and who do not take into account whether a signed BIT is in fact eventually ratified by both parties.

I focus on treaties that have entered into force mainly for practical reasons, but there are also good theoretical reasons for doing so. As a practical matter, it can be difficult or impossible for the analyst to determine whether a signed treaty that has not entered into force actually exists, and if it exists, what it might contain. States supply copies of their treaties to the United Nations for publication in the United Nations Treaty Series very haphazardly and only after entry into force (and sometimes long after

entry into force). States also tend to publish the texts of treaties in their national legislative gazettes only after ratification. Only very recently have capital exporting states, but rarely developing countries, begun to post reasonably up-to-date, comprehensive and accessible lists of their BITs online. And even in these fortunate cases, links to treaty texts may not be provided, especially if the treaty is not yet ratified or in force.

More theoretically, it would seem quite relevant for purposes of credible commitment that, as a formal legal matter, a signed treaty that has not entered into force *commits the host state to nothing of value to the investor*. Almost all investment treaties are subject to ratification procedures by one or both parties, and the treaties almost always explicitly provide that they will not enter into force until some short period after those domestic procedures are fulfilled and the ratified documents have been formally exchanged or deposited. The act of signing the treaty neither creates an obligation to ratify the instrument nor establishes the signing parties' consent to be bound by the treaty.[42] Where a treaty has failed to enter into force, neither the substantive nor procedural provisions contained therein will likely have any legal force. Most critically for the foreign investor, arbitral tribunals are highly unlikely to accept jurisdiction on the basis of a treaty-based state pre-consent where the treaty has only been signed.[43] Even where a BIT eventually does enter into force, the treaties almost always specify that disputes arising prior to entry into force do not benefit from treaty protections.

This is not merely an academic point. Most investment treaties are ultimately ratified and do enter into force, but some do so only after long delays, and some not at all. Brazil, perhaps Latin America's greatest success story in terms of attracting FDI, has signed 14 BITs as counted by UNCTAD, but ratified none. None of Colombia's four UNCTAD-identified BITs has entered into force. A number of United States BITs have also failed to enter into force, including the 1994 treaty with Russia. More generally, a recent UNCTAD study found that of 2,392 BITs signed by 2004, 674 had not entered into force; of those 674 treaties, more than 300 had been signed five or more years earlier.[44] And only

44% of African BITs signed by 2004 had entered into force, a percentage significantly lower than the equivalent figures for other regions.[45]

These are problematic truths for extant analyses that rely on credible commitment explanations, because the core idea of the credible commitment thesis is that investors are aware of the relevant treaties, reasonably view the treaties as formally committing host states to something of significant value to the investor, and take the presence of that formal commitment into account when making investment decisions. In fact, there is slim direct evidence that investors have historically had *any* significant awareness of the existence or potential significance of treaties that have entered into force, let alone treaties that have merely been signed and which have no formal power of commitment. For example, a small survey of business executives conducted in 1976 found that only 16 percent of respondents were "familiar" with ICSID, that only one quarter of that 16 percent felt that ICSID provided "adequate safeguards."[46] These results led the authors to conclude that ICSID needed to mount a major promotional campaign. It is highly unlikely that investor awareness or appreciation of specific BITs was any higher. I would wager it was strikingly lower. Perhaps even more revealing is the title of a recent practitioner-oriented publication, "Arbitration under Bilateral Investment Teaties: An often overlooked tool," which suggests that additional promotional efforts may still be needed.[47] And while anecdotes should always be approached with extreme caution, my own informal conversations with practicing international lawyers suggest that BITs rarely enter into the investment-making process in any concrete and significant way, and that far more important are rather mundane considerations relating to what might be called the "ease of doing business." Along the same lines, an analyst at a major state-sponsored investment insurance agency told me that the impression of his agency colleagues was that, with the possible exception of investors in the oil and gas sectors, investors are often "unaware of or unfamiliar with BITs and their existence or lack thereof in their countries of interest." In short, the point is that it seems quite doubtful—though this is admittedly an assertion of opinion and not of fact—that the mere signing of a treaty is either a public or confidence-inspiring enough an event to decisively influence

investment decisions.[48] It is of course true that in the last several years there has been an explosion of highly publicized investor-state arbitrations.[49] The rise of litigation and its prominence in the major newspapers makes it likely that many more investors are aware of ICSID and BITs than they were just a few years ago. Even if this is the case, however, it remains to be seen whether greater awareness decisively influences investment decisions.[50]

Comprehensive, Effective Pre-Consents. BITs that have the greatest capacity to function as meaningful credible commitment devices are those that contain comprehensive, effective pre-consents to investor-initiated arbitration. In these truly "modern" treaties, each state agrees in advance of any particular dispute to allow future investors to unilaterally initiate arbitration in the event of an "investment dispute," broadly defined, before particular arbitral tribunals. These pre-consents can be very explicit, but they can also be implicit if still very clear in their implications. For example, an explicit pre-consent might provide that "Each Contracting Party hereby consents to the submission of an investment dispute to international arbitration [as specified above]."[51] Implicit pre-consents include those that contain "formulations to the effect that a dispute 'shall be submitted' to [arbitration] or that [the investor has] the right to initiate proceedings".[52] The German Model BIT provides a typical example: "If the divergency [sic] cannot be settled within six months…it shall, at the request of the [investor], be submitted for arbitration. Unless the parties to the dispute agree otherwise, the divergency shall be submitted [to ICSID]."[53]

ICSID is a very frequent beneficiary of investment treaty pre-consents,[54] though investment treaties are also used to pre-consent to privately organized institutional arbitration, such as through the International Chamber of Commerce (ICC), or to ad hoc arbitration. I assume here that differences in the forum offered are largely immaterial. The key point is that no matter what the forum, once a standing offer to arbitrate has been accepted by the investor, the host state will find it very difficult to convince the tribunal to decline to authoritatively decide the dispute.[55] Arbitral tribunals tend to interpret

state offers to arbitrate generously,[56] and given the very real possibility of an adverse default award,[57] states have an important incentive to participate in proceedings.

Limited, Effective Pre-Consents ("Partial Pre-Consents"). A certain number of BITs contain pre-consents of extremely limited scope. These treaties typically involve a communist state, and offer the state's consent to arbitrate only certain kinds of disputes – typically disputes over the amount of compensation due in cases of expropriation, and sometimes also including disputes over the freedom to transfer investments and proceeds out of the host state. Left completely uncovered are disputes relating to the treaty's other substantive promises. The lacuna is conceptually significant for at least two reasons. First, and most importantly, BITs derive much of their credible commitment power from giving investors the ability to threaten the host state with litigation over the meaning and applicability of vague substantive promises, like "fair and equitable treatment," in order to persuade the host state to abandon or avoid a wide range of potential actions adverse to the investor's interests.[58] Excluding the possibility of litigation over such matters removes the most important arrow from the investor's quiver. Second, while protecting against the threat of uncompensated expropriation was the principle concern of investors of an earlier era,[59] today the risk of such expropriation, traditionally understood, is objectively slight.[60] This suggests that treaties that only provide guaranteed access to arbitration for expropriation disputes fail to cover the most common, modern sources of investor-state tension. And while it is difficult to say precisely how *much* less valuable these kinds of treaties are compared to those that offer investors comprehensive pre-consents, it is quite reasonable to presume that they are significantly less valuable.

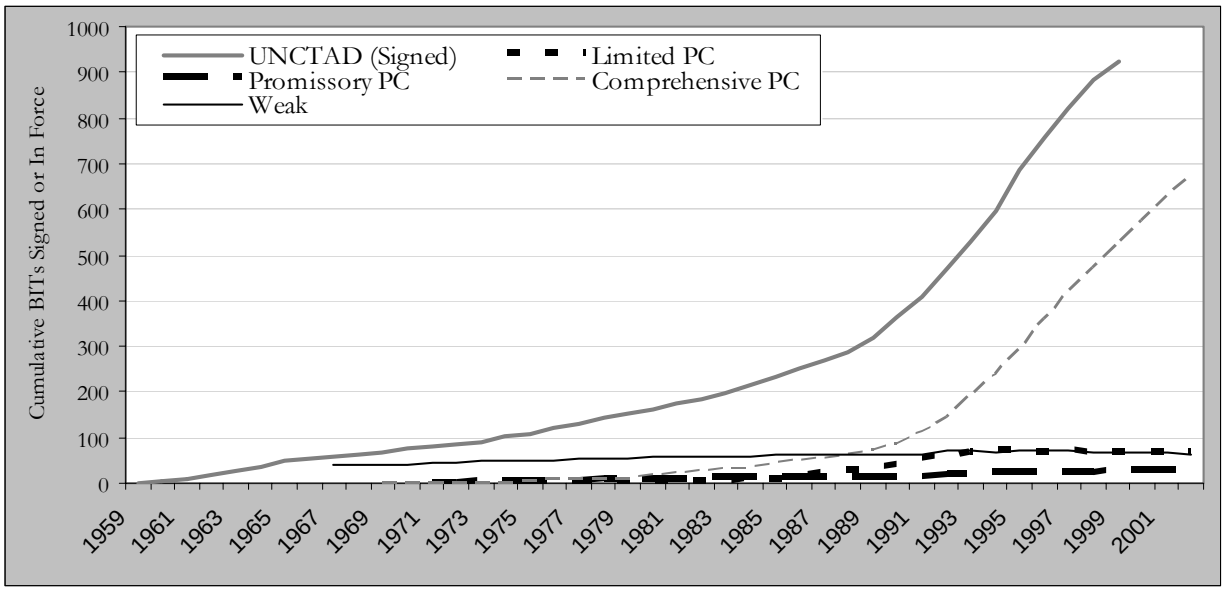
Promissory Pre-Consents. It should be obvious that pre-consenting to investor-initiated, enforceable arbitration for a wide range of investment disputes risks seriously constraining a host state's policy autonomy. Presumably for that reason a number of states have sought to regulate their potential exposure to crippling adverse awards by offering investors carefully-tailored *promises* to consent to

arbitration rather than actual pre-consents. Article 11 of the 1982 Japan-Sri Lanka BIT provides an excellent example of a promissory pre-consent: "Each Contracting Party shall, at the request of the [investor], consent to submit any legal dispute … to…arbitration." Lest this distinction strike the reader as so much lawyerly hair-splitting, let me in defense follow Schreuer in suggesting that the difference between a consent and a promise to consent can be quite significant legally,[61] and that a belief that BITs matter is typically a belief that *law* in all of its formal nuance matters. The significance is this: when a state has promised to consent to arbitration in a treaty, a refusal to actually consent when the investor so demands is indeed a breach of the treaty under international law. But in the face of such a refusal, no matter how illegal, an international arbitral tribunal will not exercise jurisdiction over the dispute, because arbitral jurisdiction always and necessarily depends on the actual consent of the parties.[62] This much is quite clear. Less clear is whether the reputational costs of breaching a promise to arbitrate will typically be so great that a promise to consent is for all practical purposes of as much value to the investor as an actual pre-consent. My own sense, defensible but certainly debatable, is that a promise to consent is worth considerably less to the investor than an actual consent, because it leaves the investor wholly exposed in those instances where the host state sees the most benefit in ignoring its substantive obligations to the investor.

No Pre-Consent. Finally, many early BITs contain no investor-state dispute-settlement provisions whatsoever. A handful of these early treaties contain mere hortatory expressions of a willingness to consider arbitration. For example, the Netherlands-Yugoslavia BIT of 1976 provides that the host state "shall give sympathetic consideration to any request" by the investor to arbitrate a dispute.[63] These kinds of treaties have no theoretical potential to credibly commit host states to treat investors favorably.

I provide details of the coding exercise in the Appendix, which presents tables organized by capital-exporting country and lists each BIT or BIT-equivalent treaty coded for the present analysis. The results of the coding exercise are presented more immediately below in summary graphical form.

Figure 2.4: Comparing UNCTAD's Count of Signed, Undifferentiated BITs to BITs in Force, Differentiated by Dispute Settlement



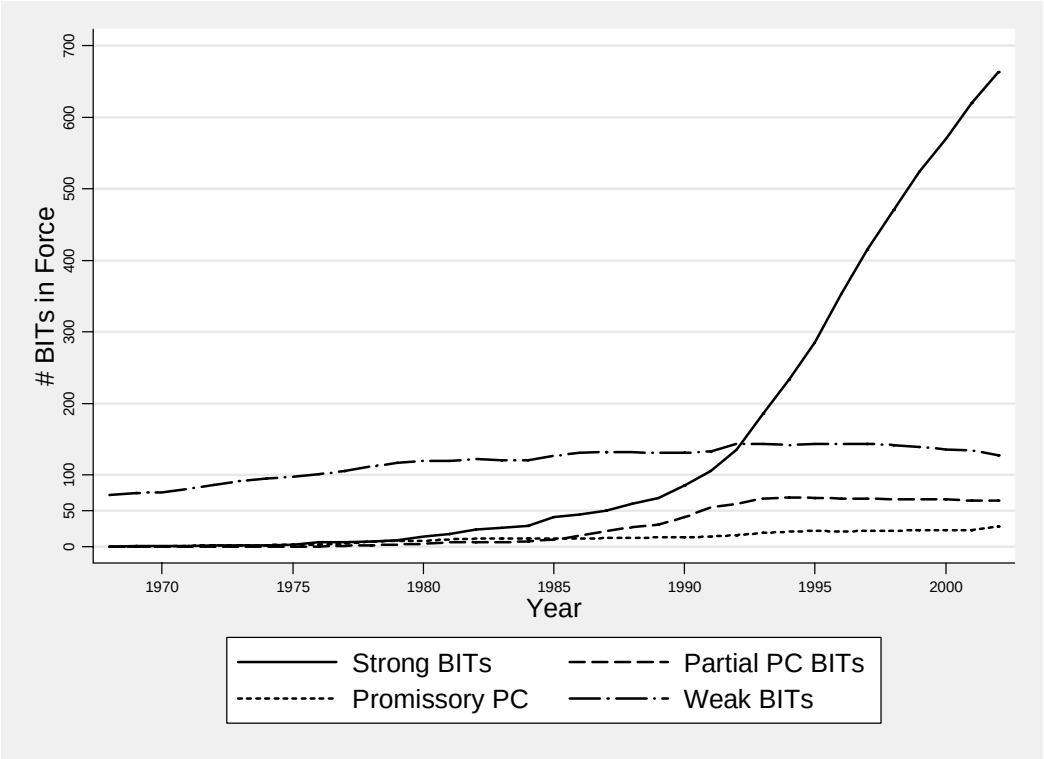
The solid gray line in Figure 2.4 shows the cumulative number of signed BITs through 1999 as listed on UNCTAD's year 2000 list. UNCTAD's list contains a number of obvious errors and omissions which most empirical BIT analysts neither notice nor correct. I leave these errors and omissions uncorrected in constructing UNCTAD's count, but I correct them in constructing my own BIT counts. For example, UNCTAD erroneously includes a number of treaties that are not properly considered to be "BITs" because they do not contain the core substantive provisions discussed above. Most notably, UNCTAD includes a number of conceptually distinct "investment guarantee treaties," which apply largely or wholly to the capital-exporting states' investment insurance programs, and a number of "establishment treaties" between France and its ex-colonies that relate to the creation of the *Communauté Française d'Afrique* (CFA) and which are essentially distinct in character and content from modern BITs . I have deleted those non-BIT treaties from my own count.

UNCTAD's list also inexplicably fails to include a relatively large number of Germany's initial BITs, including treaties with Kenya, the Philippines, Ghana, Colombia, and Chile. This absence is puzzling because UNCTAD's list does include other German BITs that failed to enter into force, such as its 1964 BIT with Ethiopia. UNCTAD's list also leaves out a BIT-equivalent 1964 "exchange of letters" between Germany and India.[64] I have included these missing German BITs in my own counts where conceptually appropriate.

We see a steady rise in the number of signed BITs (beginning with Germany's 1959 treaty with Pakistan) up until the late 1980s and early 1990s, with a fairly dramatic increase in the rate of new signings beginning about that time. This general pattern has, of course, been well-documented by others. What makes Figure 2.4 interesting is its rather dramatic illustration of the extent to which the standard way of counting of BITs both misstates the timing of the BIT phenomenon, *understood as a credible commitment phenomenon*, and grossly overstates its importance, especially in the early years. The solid dashed line shows the cumulative number of (1) in-force BITs that (2) contain comprehensive, effective pre-consents, through the year 2002. By these two criteria the BIT phenomenon did not begin until 1969, when a BIT between Italy and Chad, signed that same year, entered into force. Furthermore, the rate of modern (e.g. strong) treaties entering into force remained remarkably low until the early 1990s.

In order to better examine trends in the different kinds of BITs that are obscured by the scale of the previous figure, Figure 2.5, below, reproduces the disaggregated annual count of in-force BITs for the years 1967-2002 omitting the UNCTAD count of signed BITs.

Figure 2.5: Annual Number of BITs in Force, Disaggregated by Dispute Settlement



We see again that the BIT phenomenon, understood as a credible commitment phenomenon, by which I mean strong, in-force BITs, is primarily a phenomenon of the 1990s. The majority of BITs in force until the early- to mid-1990s were weak BITs—those containing no trace of investor-state dispute settlement provisions—and BITs with highly imperfect such provisions. Strong BITs, illustrated by the solid black line, did not become numerically important in a relative sense until approximately 1993. Furthermore, we see quite clearly that a large number of non-strong BITs remained in force over the 1990s. In 2002, for instance, 66 "partial pre-consent" treaties, which grant investors enforceable rights to arbitrate only a limited class of disputes, remained in force. We also see that BITs with promissory pre-consents are relatively rare; in 2002 only 28 of these kinds of treaties were in force. What the figures don't show, however, is that particular capital-exporting states are especially prone to use them. For example, six of Japan's nine BITs contain promissory pre-consents, as do ten of Australia's 18 BITs.

Australia's BITs are very subtle in this regard. They generally contain a comprehensive, effective pre-consent to ad hoc arbitration, *but only if Australia and its treaty partner have not joined the ICSID Convention.* Where they both have done so, the ad hoc pre-consent becomes invalid, leaving the investor with the sole option of seeking ICSID arbitration. But as to ICSID arbitration, each state party to the Australian treaties promises only that it "shall consent in writing to the submission of the dispute to the Centre within forty-five days of receiving such a request from the investor"—with the words "shall consent" indicating that the consent has not yet been given, but is only promised.[65]

The take-away point from Figure 2.5 is that our understanding of the timing and extent of the BIT phenomenon depends crucially on whether we disaggregate BITs by dispute settlement procedures. Figure 2.6, below, considers this point in more detail for two particularly important cases: the BIT programs of France and Germany. (The Dutch and Swiss BIT programs would show a similar pattern). France and Germany were at the forefront of the BIT phenomenon as UNCTAD identifies it, signing large numbers of treaties in the 1960s and 1970s, and historically both states have been very important sources of investment capital. But few if any of these states' early treaties contain comprehensive, effective pre-consents to arbitration. (For clarity of presentation I have not included in Figure 2.6 French and German BITs that contain mere promissory pre-consents or pre-consents of limited scope; doing so adds only six BITs to either state's count.) Again, the impact of the exercise is relatively dramatic: Germany and France's "modern" BIT programs appear far less ambitious than they are commonly portrayed to be; they also appear to have commenced far more recently than is typically appreciated. It is particularly striking to note that German investors did not enjoy the protections of a modern BIT until 1988, when Germany's treaty with Nepal entered into force. This is striking precisely because it is so often claimed that Germany initiated the BIT phenomenon, with the "success" of its early BIT program regarded with something approaching awe, envy, or both. In fact, however, measured by the presence of comprehensive, effective pre-consents, Germany's BIT program appears to be neither all that "first" nor

all that awesome. Note that for the entire period of study, France had more modern BITs in force than did Germany.

Figure 2.6: Comparing Counts of BITs in France & Germany

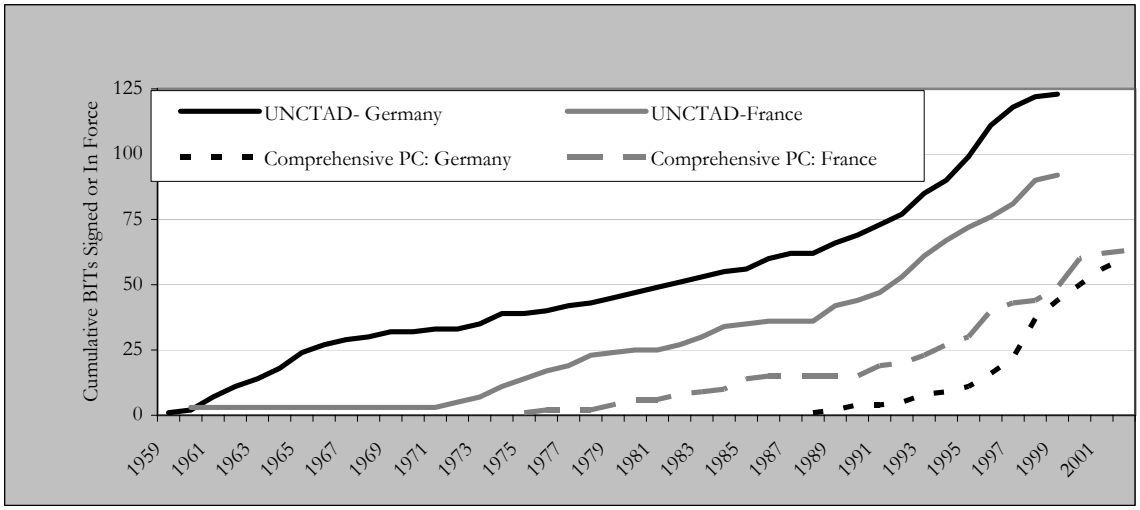
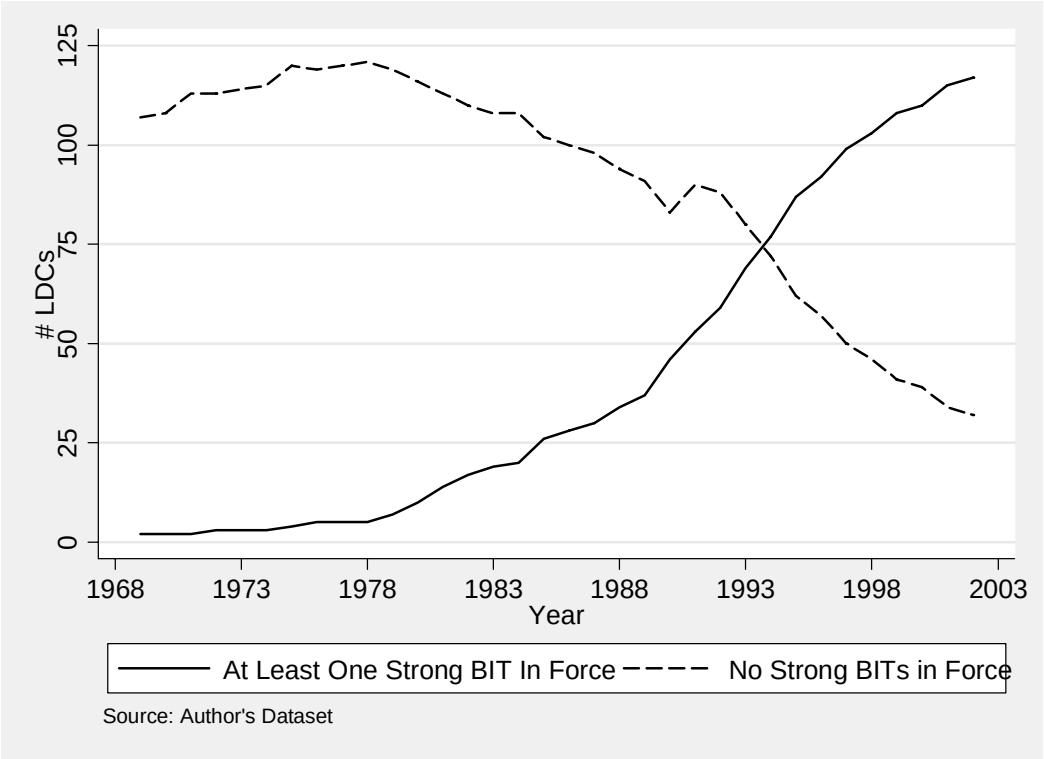


Figure 2.7, below, compares the annual number of LDCs with at least one strong BIT in force versus the annual number of LDCs with no strong BITs in force, beginning with the first strong BIT to enter into force, Chad's 1969 treaty with Italy, which entered into force that same year. The Figure provides further evidence that (strong) BITs did not become a numerically significant phenomenon until the late 1980s and early 1990s. Until 1993, a majority of capital-importing states had not entered into a strong BIT with a major capital-exporting country. But by the end of the sample (2002) we see that 117 out of 149 developing countries—79 percent!—had at least one strong BIT in force.

Figure 2.7: LDCs with One Strong BIT In Force vs. No Strong BITs in Force



Differentiating BITs on the basis of dispute settlement provisions also has huge effects on what we might call the "effective" BIT count of particular capital-importing states. Hungary, for instance, has been one of the most economically successful Eastern European states but has never bothered to update its 15 outmoded BITs, most of which it signed in the 1980s and all but one of which limit investors' access to arbitration to expropriation-type disputes. China's 13 BITs also uniformly provide very limited pre-consents, a trend that has only just recently begun to change as China begins to anticipate relying on strong BITs to protect its own investments abroad, rather than primarily as a tool to attract inward investment.[66]

What is the upshot of the argument so far? UNCTAD's list of BITs, by failing to account for key procedural differences in treaty content and entry into force, provides a conceptually inadequate

"count" of the degree to which states have credibly committed through bilateral treaties to treat investors well. Disaggregating BITs by dispute settlement provisions, and counting only BITs that have entered into force, gives us a quite different picture of the chronology and scope of the BIT phenomenon, both generally and as to particular states.

§ 2.4 Alternatives to BITs

Whatever the merits of the argument made in the previous Section, there are a number of other reasons to be extremely wary of the use of UNCTAD's list for theoretically driven empirical inquiry of foreign investment policy. These additional problems stems from UNCTAD's focus on *treaties* that are *bilateral* and that deal *exclusively* with investment. The italics indicate the three problems to be discussed below.

Multilateral Treaties as BIT Alternatives. That an investment treaty is bilateral rather than multilateral has no relevance to the treaty's potential value as a credible commitment device. It is true that the most ambitious attempts to create investment treaties of world-wide scope have failed.[67] But there are important multilateral success stories. Chapter 11 of the North American Free Trade Agreement (NAFTA) is the most obvious example. Other noteworthy examples include the Association of Southeast Asian Nations' (ASEAN) 1987 "Agreement for the Promotion and Protection of Investments";[68] the 1994 Colonia Protocol for the Reciprocal Promotion and Protection of Investments in MERCOSUR;[69] and Chapter 17 of the 1994 free trade agreement between Colombia, Venezuela, and Mexico.[70] There is also the hugely important 1994 Energy Charter Treaty (ECT), a multilateral agreement regulating energy-sector investments, broadly defined, between over 50 states.[71] Analysts are hard-pressed to justify the exclusion of these multilateral treaties from their samples, since it is beyond cavil that these treaties offer investors substantive and procedural promises that are formally and functionally equivalent to those provided in modern BITs.

There are more difficult cases. Take, for example, the 1982 League of Arab States' "Unified Agreement for the Investment of Arab Capital in the Arab States", signed by 22 states and ratified by 20.[72] While the tone and content of this particular agreement are undeniably less investor-friendly than modern BITs, the treaty does offer investors (sometimes carefully hedged) promises of MFN and non-discriminatory treatment, freedom to transfer investment proceeds, the right to "fair" compensation in the event of non-discriminatory expropriation, and the right to "compensation…equivalent to damages" in the event the host state breaches the treaty. The treaty also offers investors the possibility of bringing suit against a breaching host state before the "Arab Investment Court", a specialized dispute settlement body that came into being in 1988. Whether the Unified Agreement should or should not be considered a BIT equivalent is a question that I need not answer definitively here; the larger point is that the careful analyst will need to (carefully) consider whether it should be counted as one for the particular analysis at hand.

Incorporating multilateral investment agreements into extant analyses of BITs can present a number of other subtle considerations. For example, several ASEAN members have signed BITs between themselves, both prior to and even *after* signing on to ASEAN's BIT-like investment provisions. To cite just two cases, Vietnam joined ASEAN in 1995, but had already signed BITs with Indonesia, Thailand, Malaysia, and the Philippines as of 1992. Thailand, an original member of ASEAN, signed the 1987 ASEAN investment agreement, yet subsequently signed BITs with the Philippines and Indonesia in 1995 and 1998 respectively. This practice raises a rather obvious potential problem of double-counting that must be taken into account before blindly adding an additional seven BITs to each ASEAN member country's total count.

Incorporating the ECT into extant analyses poses a particularly significant challenge, because unlike most BITs the ECT is a sector-specific agreement. An ECT between France and Poland is clearly

not of the same import as a BIT of general application between those two states, and the presence or absence of a sector-specific agreement like the ECT necessarily needs to be appropriately weighted. The most obvious weighting scheme might consider the relative importance of the energy sector to the member states' total potential supply of FDI. But whatever scheme is ultimately adopted, it is clear that weight of some sort should usually be given. Because of the sheer number of countries that have bound themselves to it,[73] ignoring the ECT's existence should not be an option.

Commercial Treaties as Alternatives to BITs. UNCTAD identifies a 1959 Germany-Pakistan treaty as the "first" BIT because the treaty is indeed the first to deal with investment-related issues both in a sustained way and exclusively and independently of other commercial issues.[74] The claim that the Germany-Pakistan treaty is meaningfully considered to be the first BIT has been repeated by many others. The conceptual problem is that exclusivity of subject matter is hardly sufficient to distinguish the Germany-Pakistan treaty from a host of other previous and contemporaneous "commercial" treaties. These treaties were often entered into under the label of "friendship, commerce, and navigation" or something similar, and provide investors with certain guarantees while also dealing in the same document with issues of more immediate concern to traders and ship captains.

To appreciate the potential scope of the issue, note that the United States has negotiated FCN-type treaties since the early days of the Republic.[75] France, Germany,[76] Japan,[77] and the United Kingdom[78] have pursued roughly similar commercial treaty programs. The primary focus of the earliest commercial treaties was on regulating trading and merchant relations, with issues of interest primarily to investors covered only accidentally or incidentally.[79] But over time the treaties became significantly more concerned with addressing investment-specific needs, and after World War II the United States concluded a series of 21 modern FCNs with a wide variety of developed and developing countries.[80] One of the "major purpose[s]" of the post-war FCNs was to "to protect…investment abroad."[81] Many FCN-type treaties are still in force, and they are occasionally invoked by or on behalf on investors before

municipal and international tribunals.[82] Most importantly, the guarantees provided to investors in the FCNs are in many cases identical in form and substance to investment-only treaties.[83]

It is particularly instructive to compare the main investor-related provisions of the 1959 United States-Pakistan FCN with the Germany-Pakistan BIT from the same year, as Table 2.1 does below.

Table 2.1: FCNs vs. BITs

Subject	*1959 U.S.-Pakistan FCN*	*1959 Germany-Pakistan BIT*
Preamble/Object & Purpose	"encouraging mutually beneficial investments, promoting mutually advantageous commercial intercourse and otherwise establishing mutual rights and privileges"	"Desiring to intensify economic co-operation…, Intending to create favorable conditions for investments… promot[ing] investment, encourage[ing] private industrial and financial enterprise"
General Standard of Treatment	Treatment "no less favorable than other enterprises of whatever nationality engaged in similar activities" (Art. VII); freedom from "unreasonable or discriminatory measures" (Art. VI(3)); "the most constant protection and security" (Art. VI(1)).	"non-discrimination" (Arts. 1(2) & 2); "protection and security" (Art. 3(1)).
Expropriation	Allowed only for "public purpose" and against "prompt payment of just compensation" that is "effectively realizable" (Art. VI(4)).	Allowed only for "public benefit" and against "compensation" that is "actually realizable" and "equivalent of [sic] the investment affected" (Art. 3(2)).
Transfers	Freedom to transfer "funds" on national treatment or most favored nation basis (Art. XII(1)).	Freedom to transfer "invested capital and returns" "without undue delay" and at "just and reasonable" rate of exchange (Arts. 4 & 6).
Dispute Settlement (State-State Only)	Disputes between states "as to interpretation or application" subject to compulsory arbitration before the International Court of Justice (ICJ) (Art. XXIII(2)).	Disputes between states as to "interpretation or application" subject to compulsory ad hoc international arbitration (Art. 11).

The similarities are undeniably striking, and the conclusion, I think, is unavoidable: *if the Germany-Pakistan treaty is a conceptually relevant BIT, then the United States version must be considered one as well.*

The practical importance of this point will, of course, vary according to the particular analysis. Many of the United States' post-war FCNs were concluded with what today are considered to be firmly "developed" countries: Belgium, Denmark, Germany, Greece, France, Japan, Italy, Ireland, Luxembourg, and the Netherlands. Most analyses of the BIT phenomenon are primarily concerned with explaining the treaties' causes and consequences only as to developing countries. That a potentially equivalent treaty might exist between developed countries is, in those circumstances, arguably irrelevant. But the United States and several other capital-exporting states *did* sign BIT-like FCNs with a number of developing countries, and the failure of extant analyses to consider these FCNs as BIT-equivalent treaties is indefensible as long as the Germany-Pakistan BIT and others like it are also included in the analysis. Indeed, that UNCTAD's exclusion of the United States-Pakistan FCN (and other equivalent post-war FCNs) is entirely arbitrary is best illustrated by the fact that UNCTAD's list of BITs inexplicably includes a host of FCN-type commercial treaties concluded by Switzerland, France, and Sweden in the years immediately following 1959. Why these treaties should be included on UNCTAD's list, but not the United States-Pakistan FCN or others like it, is difficult to fathom.

How many BIT-like FCNs are at issue here? Not a great number, but not an insignificant number either. Table 2.2 lists the principle candidates for inclusion for four of the most important capital exporting countries. All of the FCN treaties listed below contain something arguably approximating what I have defined as the "substantive core" of modern BITs and involve "developing countries" (or countries that might fairly have suffered the name until quite recently).

Table 2.2: BIT-Like FCNs between Major Capital-Exporting Countries and Developing Countries

United States	*Japan*	*Germany*	*UK*
Ethiopia	Argentina	Dominican Rep.*	Cameroon*
Haiti*	Cuba		Iran
Israel	El Salvador		
Iran	India		
Nicaragua*	Indonesia		
Oman	Malaysia		
South Korea	Pakistan		
Taiwan	Peru		
Thailand	Philippines		
Togo	Singapore		
Vietnam			
Uruguay*			
Colombia*			
*Never entered into force or no longer appears to be in force			

Other commercial treaties are worthy of consideration. I have not included them in Table 2.2 because they emphasize investment-related issues to a significantly less degree than other FCN treaties. But this does not mean they are analytically irrelevant. Japan in particular entered into at least eight commercial treaties with Communist states that largely ignore investment but which nonetheless promise "nationals" and "legal persons engaged in business activities" MFN "treatment" in regard to their activities in the host state. It is very likely that these MFN provisions operated (and, to the extent these treaties remain in force, continue to operate) to fully extend most substantive BIT promises to Japanese investors operating in those (ex)-Communist states.

What to do about these largely BIT-equivalent FCNs? The solution, I think, is to dispose of the FCN treaties on principled ground. To the extent that the treaties fail to provide investors with guaranteed access to international arbitration (and all of them do) they should not be included in the analysis because they are not properly considered credible commitment devices of any significant potential. But if that is indeed a supportable position, then many other early investment-only treaties, like the Germany-Pakistan example, should be dropped from the analysis as well.

It should also be emphasized that an analytic focus on investment-only treaties ignores the modern trend toward embedding significant investment provisions, including guaranteed investor access to international arbitration, within free trade agreements. NAFTA's Chapter 11 is the most well-known example, but a host of other multilateral and bilateral free trade agreements contain similar investment chapters. ASEAN and MERCOSUR have already been mentioned, but there are numerous other examples. Mexico, for instance, has signed FTAs containing BIT-equivalent investment chapters with Venezuela, Colombia, Chile, Nicaragua, Costa Rica, Bolivia, Honduras, El Salvador, and Guatemala,[84] none of which are found on UNCTAD's list.

Finally, note that commercial treaties, whether of the FCN or FTA type, are not the only multi-subject treaty-based source of BIT-like guarantees to investors. The best example is Protocol One of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which provides foreign investors with an explicit guarantee that they shall not suffer expropriation in violation of the "general principles of international law"[85] and legally binds most of Western and Eastern Europe, as well as Russia and Turkey. Other provisions of the ECHR and its associated protocols give covered "natural and legal persons" the right to bring enforcement actions against expropriating states before the European Court of Human Rights; the European Court of Justice can also decide investor-state property rights claims arising under Protocol One.[86] That empirically minded BIT analysts have largely if not wholly failed to consider the European Convention as something approaching a BIT is quite troublesome. One of the central achievements of BITs is often said to be the reinforcement of customary international law principles of just compensation for expropriation.[87] The European Convention does just that, and it does so on a remarkable scale.

Of course, many international treaties, and even some non-binding international agreements, contain provisions of potential relevance to foreign investors. Among these, the General Agreement on

Trade in Services (GATS), the Treaty Establishing the European Community, and the OECD's various Declarations and Codes on foreign investment[88] stand out in particular, but there are many others of greater or lesser conceptual relevance, and of greater or lesser facial resemblance to the typical BIT. Of significant potential importance are the various "Partnership and Cooperation Agreements" (PCA) that states wishing to accede to the European Union are required to sign and which typically contain provisions promising foreign investors certain rights of establishment, non-discriminatory treatment, freedom to transfer capital, hortatory calls to promote foreign investment and to improve the investment climate, and so on--all very BIT-like promises.[89]

Let me be clear that I am not arguing that these various non-BIT instruments should necessarily be "counted" as BIT equivalents in all studies. But I do think it is important for analysts to consider in a much more careful and theoretically self-conscious manner the extent to which such instruments might make BIT commitments redundant or unnecessary as credible commitment devices.[90] For example, a PCA with the European Union, combined with the property protection provisions of the European Convention, comes perilously close to providing *exactly* the same guarantees contained in many Communist-era BITs, and I think it is exceedingly hard to justify considering the latter treaties to be theoretically meaningful but not the former.

I accordingly include BIT-equivalent commercial treaties, such as NAFTA, ASEAN, and the various FCNs, in the disaggregated counts of in-force BITs presented in the figures above and used in the statistical analyses in later chapters. In those analyses I also separately control for membership in the most important of the other close BIT substitutes discussed above.

The Need to Consider Non-Treaty Means of Credible Commitment. A study seeking to explain why people use umbrellas would surely be suspect if it ignored the possibility of foregoing umbrellas for raincoats or folded-up newspapers. To say that individuals choose to use umbrellas because umbrellas

keep them dry begs the question of why they choose umbrellas and not rain slickers or the morning broadsheet. The same goes for any study of the effectiveness of umbrellas at performing their task. To conclude that umbrellas succeed in warding off wet clothes begs the question of whether success is to be measured in terms of the likely outcome of going out of the house unprotected or rain-coated.

The problem is one of identifying the proper comparison. Most BIT analysts seem to presume that the relevant comparison is indeed between going out in the world well-protected – e.g. protected by a BIT – or not protected at all. This presumption is particularly evident in Guzman's elaboration of his cartel theory of the reasons "why LDCs sign [BITs] that hurt them,"[91] but it is a presumption implicit in other BIT studies too. As presumptions go, this one is particularly unfounded. Some reasons have already been mentioned but nonetheless bear repeating: other kinds of treaties—multilateral rather than bilateral, commercial rather than investment-only—may contain provisions largely equivalent to those traditionally provided in BITs. But it is also essential to realize that states can provide BIT-like guarantees, of both a substantive and procedural nature, through formal non-treaty instruments such as municipal law and individual investment contracts. These treaty alternatives also have strong potential to function as substitute credible commitment devices.

Municipal Law. Take municipal law first. Recall that BITs perform two logically separate functions – they are devices through which host states can extend favorable substantive promises, and through which host states can make those promises credible. Non-specialists tend to assume that a host state's decision to enter a BIT is necessarily a decision to significantly liberalize FDI policy – that is, that signing or ratifying a BIT is to extend to investors significantly more favorable substantive promises than were being offered to investors absent the BIT. With the potential exception of U.S. BITs, which, as mentioned earlier in the Chapter, require national treatment at the pre-investment stage, this is simply not the case. Most BITs do not require host states to accept more investment, nor do most BITs prevent host states from imposing burdensome performance requirements on investors as a condition of entry.

Instead, what might be called the "liberality" of a host state's FDI regime is primarily determined by promises extended to investors through municipal law. For example, municipal law defines which sectors of the economy are open to foreign investment and on what particular terms; it determines tax rates, the availability of investment incentives, and conditions of operation. The vast bulk of what matters legally to foreign investors is supplied by municipal law, and indeed, this is unavoidable because BITs, as quite brief and general statements of the law applicable to investments of all types, are necessarily unable to provide investors or host states with a sufficiently detailed and self-contained legal regime. It is unsurprising that for much of recent history investment "framework" laws have been the primary means both of promoting and controlling foreign investment in the developing world.[92]

Municipal law is thus a necessary complement to BITs. But municipal law can also provide the *same* substantive guarantees as BITs, and it can provide them much more broadly. For example, domestic laws often contain fairly favorable rules concerning compensation for expropriation. Domestic laws also frequently specify that foreign investors in most sectors shall enjoy "national treatment." Over the past decade host states have also used domestic law to greatly liberalize their capital accounts, allowing foreign investors much greater freedom to repatriate assets and income.[93] And unlike BITs, which provide their guarantees only to investors from a single home state, municipal law guarantees are in principle extended to investors from the world over.

From the investor's perspective, of course, the main problem with municipal law is the relative ease with which the host state may be able to change the laws in adverse ways. It is reasonable to presume that BITs might usefully serve to reduce state incentives to change municipal law in ways unfavorable to the foreign investor by providing causes of action for "regulatory takings" and the like. But the potential utility of BITs in this regard hardly means that favorable municipal law promises may not be made sufficiently credible by other means.

On the one hand, municipal law itself can make changes in the law formally difficult to achieve. This is particularly the case where, for instance, guarantees of compensation for expropriation are embedded in the national constitution, as they have been in most Latin American countries for some time.[94] A more unusual example is provided by Greece, which in the past has used a special legal procedure to grant investment-related laws "special status" that constrained the government's ability to amend the laws.[95] On the other hand, host states can use municipal law to explicitly promise investors that the relevant legal regimes will remain stable as to their current investments. Article 9 of Russia's 1999 Federal Law on Foreign Investment, which bears the unwieldy title of "Guarantees to Foreign Investors and Companies with Foreign Investment Against Unfavorable Changes in the Legislation of the Russian Federation", is one particular example.

I do not wish to lend any sort of magical power of commitment to a host state's unilateral legislative declarations that foreign investors are welcome on such and such terms. Bolivia's very recent announcement of a "nationalization" of the assets of foreign-owned natural gas operations is a powerful reminder that in the law and politics of foreign investment what has gone around often comes around once again, and that a state that greatly values change in the status quo is unlikely to be dissuaded from vigorously pursuing it, though law or contract might inconveniently stand in the way. That said, it is reasonable to presume that a state that has explicitly and publicly made pro-investor promises in an investment law will indeed be more likely to think twice about changing the regulatory regime in ways adverse to foreign investors than one that has not, *even absent a binding commitment to international arbitration.* In other words, our old friend "reputation" has a potentially great role to play here, especially if breaches of municipal law promises, because of their relative clarity of meaning and application, are more easily detectable than breaches of vague treaty law.

Regardless of the role that reputation might or might not play in naturally stabilizing certain kinds of favorable municipal law promises, host states can also use municipal law to provide investors

with guaranteed access to international arbitration, where claims of unfair changes in the substantive domestic legal regime (or other claims) can be litigated. Greece appears to be one of the earliest states to embed a promise to arbitrate in its foreign investment laws,[96] but it is certainly not the only example. Fatouros's excellent 1963 survey of "investment guarantees" finds that states anxious to develop their petroleum resources were especially likely to provide for international arbitration of investment disputes through domestic laws.[97] A more recent survey has found that approximately 20 national foreign investment laws contain "generic consent provisions offering to submit disputes with investors to arbitration under the ICSID Convention."[98]

Why does all this matter? It suggests, on the one hand, that BITs are not a necessary part of the "competition" for capital. To the extent that BIT promises are replicable in municipal law, host states might reasonably respond to a "competitor's" decision to enter a BIT by offering investors equivalent promises in municipal law. Consider a more subtle point: even if municipal law is congenitally unable to function as a perfect BIT substitute, it nevertheless provides host states with a tool through which concessions can be made to investors that will, from the investor's perspective, more than make up for the lack of an investment treaty. "Utility" is the currency of the land, and an investor should be willing to accept, as the price paid for the investment, more favorable investment incentives, tax breaks, or the like that will make up for the lack of a BIT. BITs become a necessary part of the "competition" for FDI only if the "competitors" are already offering investors all of the other policy concessions at their disposal. But there is little reason to think that they are.

The relevance of municipal law promises also suggests that disentangling the causal effects of BITs on FDI flows from the causal effects of contemporaneous, favorable changes in the domestic legal regime poses substantial difficulties that the statistically oriented empirical literature on BITs has yet to adequately address. Over the past fifteen years many host states have dramatically modernized and liberalized their foreign investment laws – opening up new sectors to foreign involvement (often by

privatizing state-owned enterprises and contracting out the provision of basic governmental services), relaxing joint venture requirements, eliminating investment screening boards and performance requirements, establishing investment promotion agencies and export processing zones (EPZs), and so on. It is undeniable that investors have attached "considerable value" to these changes when they have taken place.[99] Take Mexico for instance. In 1993 Mexico enacted an ambitious new Foreign Investment Law – a "crown jewel" achievement representing an unprecedent "repudiation" of Mexico's historically ambivalent and often hostile policies toward foreign investors.[100] At virtually the same time Mexico signed its "BIT" with the United States and Canada – Chapter 11 of NAFTA – and joined the OECD and its international investment instruments. Which policy change is responsible for the resulting increases in Mexico's foreign investment inflows? Would United States investors have flocked to Mexico absent NAFTA but with the protections and guarantees of the 1993 law? Are the contemporaneous OECD commitments safely ignored? I leave it to others to provide definitive answers, but there is some indication that Mexican authorities, at least, viewed Chapter 11 and the 1993 domestic legal changes as largely substitutable, and Chapter 11 as largely redundant to what Mexico was already ready to do—and ultimately did do— unilaterally. In their in-depth analysis of "how the [NAFTA] deal was done," Cameron and Tomlin argue that Mexico accepted Chapter 11, and NAFTA more generally, because it "desire[d] to implement a radical agenda of economic restructuring within Mexico. NAFTA was the cornerstone of this policy, and many of the measures that Mexico was called upon to take in the NAFTA were ones that Mexican leaders had already decided to undertake anyway." They add, "The policies [embedded in NAFTA] were, however, policies that could have been undertaken anyway, if not under the NAFTA, then under the auspices of the GATT, or even in come cases unilaterally. In some ways NAFTA was simply the culmination of a process of dramatic economic and social restructuring that had occurred, or was [already] occurring in Mexico." [101]

Investment Contracts. Municipal law is not the only plausible BIT substitute. Foreign investors, unlike private parties engaged in international trade, are often placed in the position of explicitly

bargaining with host states over the terms under which they are allowed to establish their investment and to continue operations.[102] This is especially so in the natural resources sector,[103] where the host state usually own the natural resources to be extracted, and in the public utilities or infrastructure sectors,[104] where the investor is called upon to provide an essential public service, like the provision of electricity or a passable highway. But it is also true in the manufacturing sector (as more generally), where the foreign investor is typically required to enter into privity with the host state in order to receive special treatment, such as tax incentives or the right to operate in an EPZ.

The opportunity to bargain is important because it provides the foreign investor with the occasion to induce the host state to clarify the terms of the investor's entry and operation, or to improve upon the promises offered under municipal or international law.[105] Indeed, there is good reason to view the investment contract as the *most* effective formal legal means at the investor's disposal of securing his investment, by allowing the investor to negotiate for relatively precise substantive terms and to protect those terms through the inclusion of enforceable arbitration, choice of law, and stabilization clauses [106] Entering into an investment contract, especially one with an arbitration clause, may also provide a number of important side benefits, such as improving the investor's access to project financing or investment insurance.[107]

Early contracts between host states and investors tended to be "rather simple documents,"[108] but these contracts have become significantly more detailed and complex over time.[109] To cite one example from a recent, prominent international arbitration, the water services concession contract at issue was 111 single-spaced pages long, "consisting of 16 articles plus lengthy appendices," and was the product of two years of negotiation.[110] And lest one think that foreign investment contracts are a phenomenon limited to the infrastructure or natural resources sectors, note that Intel's practice when deciding whether to construct new semi-conductor manufacturing facilities is to enter into intensive haggling with potential

host states over a variety of fine-grained matters, and to insist that any resulting deal be committed to a written contract before the investment will be sunk.[111]

In fact, in many of the early investment framework laws it was explicitly envisioned that most foreign investors would enter into some sort of "establishment agreement" with the host state in the process of gaining state approval to make the investment.[112] Many states still require investments to be "approved" before they will receive the benefits of a BIT.[113] "Approval" does not necessarily mean "contract," but the approval process does give the investor at least an informal opportunity to ask for a formal agreement. Latin American states in particular have historically preferred to bargain directly with foreign investors rather than to grant foreign investors rights indirectly through treaties with the investors' home states,[114] and certain of those states still seek to encourage investor-state contracting by making access to favorable guarantees benefits contingent upon it.[115]

Home states have also long encouraged investor-host state contracting. For example, investors will often be legally precluded from accessing home-state sponsored investment insurance absent the host state's formal "approval" of the investment.[116] Some home state investment insurance programs go even further in requiring an actual investment "agreement."[117] Unsurprisingly, these investment agreements routinely contain state pre-consents to international arbitration. Arbitration clauses began to appear regularly in petroleum concessions in the middle of the last century;[118] and quickly came to be viewed as a necessary complement to contracts made in that sector.[119] Today arbitration clauses are standard across the board. Indeed, investment framework laws often expressly provide that investment contracts *shall* contain arbitration clauses.[120] The availability of foreign investment insurance also again has a role to play here. French investment guarantee treaties, for instance, require host states to insert investor-state arbitration clauses in investment contracts as a condition for insuring the project.[121] French BITs have also required host states to promise to insert arbitration clauses into investment contracts upon the investor's request.[122]

Obtaining an accurate and comprehensive indicator of the use or content of investment contracts is impossible because the contracts are not systematically collected and published. But best-guess estimates suggest that investment contracts have been and remain an essential component of the modern regime of foreign investment protection,[123] and that many of those contracts do indeed contain host state pre-consents to investor-initiated international arbitration.[124] Even Latin American states, which have long insisted on inserting "Calvo clauses" into investment agreements that require the investor to submit to the exclusive jurisdiction of municipal courts, appear to have relaxed their attachment to that particular contractual term.[125] The continuing relevance of investment contracts matters for BIT analysts for much the same reason that the continuing relevance of municipal law matters: it suggests that the presence or absence of a BIT, by itself, is a lousy measure of the extent to which a host state has extended credible and favorable promises to investors.

§2.5 **BITs and Bargaining: An Alternative Understanding**

In this Chapter I have tried to make two modest but important points. The first, which is essentially that all BITs are not created equal and that analysts need to do a much better job sorting wheat from chaff, is sufficiently simple that further comment should not be necessary. The second point—of the existence of numerous BIT substitutes—deserves a bit of further explication. We have seen that BIT analysts tend to adopt a predominantly rational-functionalist view of the treaties that produces, in summary form, something like the following arguments: we can expect signing treaties to lead to increases in FDI flows because the treaties function as credible commitment devices, and many investors won't invest absent this particular form of commitment; host states are competing for these commitment-sensitive investments, and will naturally want to sign the treaties that the investors require.

What is lacking in the standard functionalist story is any sustained comparative analysis of why the treaties, as one potential credible commitment device among at least several others, are any better suited to performing the task at hand than their primary competitors. This is a curious failing because one of the central lessons of the transaction-cost economics literature from which the credible commitment story is in part drawn is that careful comparison is essential to understand the development of new institutional arrangements. The discussion above focused on several relatively formal ways in which host states might effectively make such commitments even in the absence of a BIT. In particular, domestic laws and investment contracts might be used to make favorable substantive promises; to the extent that reputational concerns alone are not up to the task, binding commitments to arbitrate disputes can be appended. Other mechanisms for coping with the problem of the obsolescing bargain, although not discussed in detail above, should not be forgotten. The widespread availability of home state-sponsored investment insurance is especially significant, as is the availability of private ordering types of solutions, in which the investor structures its relationship with the host state, perhaps by creating an economic "hostage," to make breach less attractive an option.[126]

And we should not forget the power of reputational concerns to curb opportunistic assaults by host states on investment profitability. This may seem a curious caveat given my arguments above that we can not expect reputational concerns alone to render treaty-based legal promises to investors especially credible. That was indeed the argument. Treaty-based legal promises are generally too ambiguous and too vague in content and application to reliably cause host states to suffer reputational costs in the eyes of other investors *as "breakers" of international law*. In other words, in the absence of authoritative adjudication, the reputational value of an investment treaty is purely rhetorical—it gives an aggrieved investor an opportunity to declare to the world that the particular host state not only treats investors badly, but that it does so in a way that is "illegal" under international law. But the added benefit of a rhetorical (and, in the absence of authoritative adjudication, unverifiable) claim of "international illegality" is likely to be quite slight. Foreign investors undoubtedly care about whether host states have a

reputation for treating investors "fairly" (in a non-technical, non-legalistic sense), for making their lives relatively easy, and their investments profitable, and so on. And they are able to verify the spotlessness of that general, non-legal reputation by talking to other investors. Indeed, there is strong evidence that investors *do* talk about precisely such things. For example, in her well-researched case study of Intel's surprising selection of Costa Rica as the site for a $300 million semiconductor assembly and testing plant, Spar describes Intel's practice of consulting with existing foreign investors in Costa Rica. These interviews, upon which Intel "relied heavily," allowed Intel to "assess Costa Rica's record in delivering on its promises."[127] Spar concludes that

> Costa Rica got on Intel's list because other investors had already gone there and were beginning to spread word of the country's attractions. This follow-the-leader process supports what the data on FDI already suggest: it is highly concentrated in a handful of top recipient. Because companies such as Intel rely so extensively on word-of-mouth reports from existing investors, each round of investment seems to generate its own offspring, and success in attracting FDI begets success.

The implication of this practice is that as long as developing countries desire additional FDI in the future, they have a very strong incentive to ensure that these "word-of-mouth reports" are favorable. This basic point points to a fundamental weakness of the "obsolescing bargain" (OB) theory that underlies most analyses of BITs. OB theory models the interactions between host states and investors as a two-player, two-shot game. The state and the investor bargain at Time One, and reach a bargain very favorable to the investor because the host state wants to encourage the investor to sink the investment. At Time Two, once the investment is sunk, the host state uses its leverage, borne of the fact that it holds the sunk investment hostage, to revise the original bargain. The investor, suckered, accepts his fate. What OB theory entirely fails to explore is how this theory fits into a multi-investor world, in which multiple decisions to invest are spread across time. We might expect the first investor to be suckered, but why would we expect the second, third, and fourth investors to similarly fall for the host state's ruse?

The fundamental question, then, is what do BITs add to what was already available to protect investments from problems of obsolescing bargain and of credible commitment? My own suspicion is "not much." BITs are hardly the inevitable solution to an insoluble problem of obsolescing bargain that they are often made out to be. Once we recognize the plethora of alternatives to BITs, including informal alternatives such as "reputation", it seems quite likely that the obsolescing bargaining problem is not nearly as big a problem for investors as it is typically said to be.

"Not much" is not the same thing as "nothing," of course. In one of the more subtle and perceptive evaluations of the treaties, and one that is worth quoting at length, Wälde has argued that

> Before the advent of [modern BITs], the treaty drafters expected investors to be able to negotiate their own dispute settlement method by way of agreement with the host State.
>
> … the treaties, in effect, added a direct investor right without regard relation to underlying dispute settlement arrangements in order to create an investor right that was independent of the *ad hoc*, individual negotiation, licensing or other parts of the investment process. *This was done under the assumption that investors should not have to rely on their own negotiating strength and ability* but be able to rely on a general treaty-provided remedy…granted by law, not waivable and not dependent on an individual jurisdiction agreement with the state.
>
> …
>
> … [the treaties] thus partly replace[] the need to negotiate in the contract with the host state an internationalization regime consisting of stabilization, arbitration and an international law clause.
>
> Modern investment treaties have further developed this approach. They include methods of property and contract protection *which individual investors, in an often more difficult negotiating context, might not have been able to negotiate on their own.*[128]

In other words, what BITs bring to the table is something different from what BIT analysts typically assume. Take, for instance, Guzman's claim that BITs are of great theoretical importance principally because they "allow potential investors to negotiate for whatever protections and safeguards they feel are needed. In other words, BITs provide the investor with protections that are superior, in all forms of investor-host conflicts, to those of customary international law."[129] It should be obvious that this claim is

highly suspect, in large part because host states have long had the capacity to credibly bind themselves through municipal law and contract, a capacity that the BIT phenomenon has done little directly to enhance or promote. Investors were "allow[ed]" to negotiate with states well before BITs rose to prominence, and other institutional innovations (particularly the New York and ICSID Conventions)—allowed investors to secure the fruits of those negotiations with access to effective dispute settlement procedures.

But even more fundamentally, BITs can *interfere* with investor-state negotiation by granting investors "protections and safeguards" that they are unable to waive, and that they may or may not have been able to convince a host state to grant them in direct negotiations. This is the point that Wälde's analysis brings to the forefront, and it is immensely important because it suggests that the main function of BITs is not to facilitate bargains that would otherwise not have occurred, or to check states from acting unfairly upon post-contract shifts in their bargaining power, but to limit host state bargaining power from the outset. The obsolescing bargain theory, which posits that host state power is at its weakest at the time of initial contracting, and that the investor will usually have no trouble convincing the host state to promise it the world and more, is truly turned on its head, because it is precisely at this point that there should be the *least* objective need for a treaty to specify the particular terms of the deal. If an investor cares enough about a particular promise, procedural or substantive, he can bargain for it. BITs remove a good part of the bargaining space by forcing the host state to offer particular terms to all comers, even those who would have invested without those particular promises contained in the BIT.

Given this understanding of the logic of the treaties, it is worth considering whether their primary useful and relatively unique function might be one *of reducing bargaining* costs rather than of permitting credible commitment. The treaties eliminate the need for investors and host states to engage in costly direct bargaining by providing the parties with default, off-the-shelf rules to govern their relationship. These are rules the parties would have agreed to anyway (the argument would go), and

incorporating the rules into a treaty eliminates the need to go through the motions of formal contracting on a project-by-project basis.

The notion of BITs as default rules is attractive in large part because many host states have recently begun dismantling or scaling back their investment-approval institutions (often under pressure from the United States), thereby eliminating opportunities for investors and states to easily enter into direct privity. But a default rules-based understanding of BITs faces a number of conceptual problems. First, and as we have seen, the default rules provided by BITs are too vague for the most important foreign investment projects, such as mining ventures or semi-conductor or automobile manufacturing facilities. In those cases the foreign investor will almost always be in dialogue, and indeed in a true bargaining situation, with host state authorities, and will be well-positioned to demand what BITs have to offer. Second, from a default-rules perspective it is quite difficult to justify the tendency of BITs to prevent host states and investors from bargaining around BIT rules. If BITs require host states to extend to investors offers richer than the value of the investment to the host state, the host state will simply not allow the investment to take place. The surprising implication is that in some cases BITs might actually be expected to *discourage* investment by preventing host states and investors from reaching a mutually acceptable bargain. Third, if BITs are best viewed as reducing bargaining costs, and if bargaining costs in the absence of a BIT are rather slight compared to the overall value of the typical investment project (as I imagine they must be), then the competitive advantage that BITs can be expected to provide to developing states is correspondingly slight, and BITs should not be associated with very significant increases in investment flows. And if this is indeed the case, we should be extremely suspicious of empirical studies that purport to find otherwise.

[1] *Quoted in* L.H. Woolsey, *The Problem of Foreign Investment*, 42 AMER. J. INT'L L. 121 (1948) (internal quotations omitted).

[2] C. Fred Bergsten, *Coming Investment Wars?* 53 FOREIGN AFF. 135, 136 (Oct. 1974).

[3] *Id.* at 151-52.

[4] Dennis J. Encarnation & Louis T. Wells, Jr., *Sovereignty en Garde : Negotiating with Foreign Investors*, 39 INT'L ORG. 47 (1985).

[5] In Figure 2.1 LDCs include those countries defined by the World Bank as "low and medium income"; in Figure 2.2 LDCs include those countries identified as such by UNCTAD. The two lists overlap considerably.

[6] *See* UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS [UNCTC], BILATERAL INVESTMENT TREATIES (1988); UNCTAD, BILATERAL INVESTMENT TREATIES IN THE MID-1990S (1998); UNCTAD, BILATERAL INVESTMENT TREATIES 1959-1999, UNCTAD/ITE/IIA/2 (2000).

[7] A.A. FATOUROS, GOVERNMENT GUARANTEES TO FOREIGN INVESTORS (1962).

[8] RAYMOND VERNON, SOVEREIGNTY AT BAY: THE MULTINATIONAL SPREAD OF U.S. ENTERPRISES 46-59 (1971); *see also* Jean Boddewyn, "Early U.S. business-school literature (1960-1975) on international business-government relations: its twenty-first-century relevance", *in* INTERNATIONAL BUSINESS AND GOVERNMENT RELATIONS IN THE 21ST CENTURY 25 (Grosse, ed. 2005).

[9] *See, e.g.,* OLIVER E. WILLIAMSON, THE MECHANISMS OF GOVERNANCE 377 (1996) (defining "credible commitment" as "a contract in which a promisee is reliably compensated should the promisor prematurely terminate or otherwise alter the agreement. This should be contrasted with noncredible commitments, which are empty promises, and semi-credible commitments, in which there is a residual hazard. Credible commitments are pertinent to contracts in which one or both parties invest in specific assets."). Ideas of credible commitment, often explicitly drawn from Williamson's work, permeate the broader "political risk" literature and the much broader literature on the institutional origins of economic growth. *See, e.g.,* WITOLD JERZY HENISZ, POLITICS AND INTERNATIONAL INVESTMENT: MEASURING RISKS AND PROTECTING PROFITS (2002); DOUGLAS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 50 (1990).

[10] *See, e.g.*, Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639 (1998).

[11] J. W. Salacuse & N. P. Sullivan, *Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARVARD INT'L L. J. 67 (2005).

[12] *See, e.g.*, Thomas W. Wälde, *The "Umbrella" Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases*, 6 J. WORLD INVEST. & TRADE 183, 185 (2005) (discussing BITs as part of a "culture of commitment").

[13] UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS [UNCTC], BILATERAL INVESTMENT TREATIES (1988); UNCTAD, BILATERAL INVESTMENT TREATIES IN THE MID-1990S (1998); UNCTAD, BILATERAL INVESTMENT TREATIES 1959-1999, UNCTAD/ITE/IIA/2 (2000).

[14] As Carmines and Zeller put it, "In a very general sense, any measuring device is valid is it does what it is intended to do. An indicator of some abstract concept is valid to the extent that it measures what it purports to measure." EDWARD G. CARMINES & RICHARD A. ZELLER, RELIABILITY AND VALIDITY ASSESSMENT 12 (1979).

[15] *See generally* WILLIAM M. K. TROCHIM, RESEARCH METHODS KNOWLEDGE BASE ch. 6. (2001); EDWARD G. CARMINES & RICHARD A. ZELLER, RELIABILITY AND VALIDITY ASSESSMENT (1979).

[16] CARMINES & ZELLER, *supra* note 14, at 10.

[17] UNCTC 1988, *supra* note 13, at 40.

[18] The difficulty is compounded by the fact that "MFN clauses do not have a universal meaning. Indeed, the formulation and application of MFN clauses varies widely among investment treaties….The proper application and interpretation of a particular MFN clause in a particular case requires careful examination of the text of that provision". OECD, "Most-Favoured-Nation Treatment in International Investment Law," Working Paper on International Investment Number 2004/2.

[19] Many Canadian BITs also apply at the pre-establishment stage, but unlike U.S. BITs, Canadian BITs expressly exclude disputes over the breach of pre-establishment rights from the treaties' investor-state dispute settlement provisions.

[20] *See generally* Beth V. Yarbrough & Robert M. Yarbrough, *Reciprocity, Bilateralism, and Economic 'Hostages': Self-Enforcing Agreements in International Trade*, 30 INT'L STUD. Q. 7 (1986).

[21] That reputation might play a role in promoting host state compliance with international obligations (investment related or otherwise) is an old and rather obvious idea. *See, e.g.*, Roy Preiswerk, *New Developments in Bilateral Investment Protection (With Special Reference to Belgian Practice)*, 3 REV. BELGE DR. INT'L 173, 195 (1967); Guzman provides a recent recycling of the idea. Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823 (2002). The real question is whether reputational concerns alone are sufficient to promote widespread compliance with BIT obligations. Preiswerk takes the position that they are; my own views, as developed below, are much more skeptical.

[22] M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 235-36 (2004).

[23] P.T. MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 625 (1995) (emphasis added). Klebes, in a memorable turn of phrase, has suggested that the vagueness of BIT promises renders the treaties mere "traités d'atmosphère". Heinrich Klebes, Encouragement et Protection des Investissements Privés Dans les Pays en Développement : Les Traités Bilatéraux de la République d'Allemagne Dans Leur Contexte 594 (1983) (doctoral dissertation, University of Strasbourg)

[24] *See, e.g.,* Albrecht Stockmayer, *Bilateral Investment Promotion Protection and Treaties: A Model for Community Promotion of Mining Investment?* 3 J. ENERGY & NAT. RES. L. 247, 253-54, 256-57 (1985); ANDREAS F. LOWENFELD, EXPROPRIATION IN THE AMERICAS: A COMPARATIVE LAW STUDY 7 (1971).

[25] *See, e.g.*, Vicki Been and Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protection and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 55 (2003).

[26] *See, e.g.*, Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2004).

[27] As Douglas North has emphasized more generally, "the costs of measurement and enforcement, discovering who is cheating whom, when free-riding will occur, and who should bear the cost of punishing defectors make self-enforcement ineffective in many situations." NORTH, *supra* note 9, at 50. A major part of the difficulty arises from the high costs of "measuring the multiple margins that constitute contract performance." *Id.* at 54.

[28] I leave aside the possibility that what matters for reputational purposes is the mere fact that the host state and a particular investor are publicly feuding. In that case, the existence of the dispute might be taken as powerful *prima facie* evidence of a poor investment climate, regardless of the objective merits of any associated legal arguments or of the "true" factual state of affairs. The ultimate question is one of the informational value of an investor's (or its home state's) public claims of breach. Given inherent legal and factual uncertainties and strategic incentives to exaggerate and mislead, I assume that most third-party observers will in most cases attach little value to rhetorical claims of breach absent authoritative adjudication of the underlying claims.

[29] Guzman, *supra* note 21 at 1873.

[30] At the instigation of the U.S. Government, NAFTA's Free Trade Commission issued a legally binding "clarification" that Chapter 11's promises of "fair and equitable" treatment and "full protection and security "do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens," and that the "minimum standard" of treatment imposed by NAFTA was no more than that same customary standard. Statement on NAFTA Article 1105 and the Availability of Arbitration Documents, 31 July 2001, *available at* http://www.naftaclaims.com/commission.htm. And it has long been recognized that one of the primary aims of the U.S. BIT program has been to codify U.S. understandings of customary international law, particularly in regard to compensation for expropriation. Kenneth J. Vandevelde, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L.J. 201, 212 (1988).

[31] UNCTC 1988, *supra* note 13 at 9.

[32]Douglas C. North, *Institutions and Credible Commitment*, 149 J. INST'L L & THEORETICAL ECON. 11, 21 (1993).

[33] Indeed, some would say that *by definition* standards are given useful content after the fact through adjudication. Louis Kaplow, *Rules Versus Standards*, 42 DUKE L.J. 557 (1992)

[34] *See, e.g.*, Robert B. Shanks, "Lessons in the Management of Political Risk: Infrastructure Projects (A Legal Perspective)", *in* MANAGING INTERNATIONAL POLITICAL RISK 93 (Moran, ed. 1998).

[35] Wälde, *supra* note 12, at 194. Wälde is not alone in viewing access to arbitration as the "greatest innovation" of BITs. A recent arbitral decision makes the point as well. Enron Corp. v. Arg. Rep., Decision on Jurisdiction (Ancillary Claim), Aug. 2, 2004, ICSID Case No. ARB/01/03, ¶ 37.

[36] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature, Mar. 18, 1965, 575 U.N.T.S. 159.

[37]David Crawford, "Businessman vs. Kremlin: War of Attrition", WALL STREET J., Mar. 6, 2006, at p. A6.

[38]*Cf.* Jürgen Kurtz, "The Delicate Extension of Most-Favored-Nation Treatment to Foreign Investors: Maffezini v. Kingdom of Spain", *in* INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES, AND CUSTOMARY INTERNATIONAL LAW 523 (Todd Weiler, ed.) (2005).

[39] I am aware of three recent arbitral decisions that have taken a very restrictive view of the applicability of MFN clauses to dispute settlement provisions: *Vladamir Berschader and Michael Berschader v. Russian Federation*, *Telenor Mobile Communications A.S. v. Republic of Hungary*, and *Plama Consortium Limited v. Republic of Bulgaria* all rejected the investors' claims that an MFN clause should be allowed to transform a "partial pre-consent", as defined below, into a "comprehensive pre-consent" that would allow the investor to force arbitration of non-expropriation treaty claims. The three cases are discussed in UNCTAD, *Latest Developments in Investor-State Dispute Settlement,* UNCTAD/WEB/ITE/IIA/2006/11 (2006).

[40] These percentages are based on my calculations from FDI data compiled by UNCTAD´s Division on Investment, Technology and Enterprise Development and available on UNCTAD's website, www.unctad.org.

[41] CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 191-224.

[42] *See, e.g.*, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 582-83 (6th ed. 2003). I not aware of any serious evidence that a state's failure to ratify a signed treaty imposes upon it any significant reputation costs, either in the eyes of investors or other states.

[43] UNCTAD, "Occasional Note: Many BITs Have Yet to Enter into Force", UNCTAD/WEB/ITE/IIA/2005/10 (2005) at p. 6.

[44] *Id.* at 4.

[45] *Id.* at 4 Table 2.

[46]John K. Ryans, Jr. & James C. Baker, *The International Center for Settlement of Investment Disputes (ICSID)*, 10 J. WORLD TRADE L. 65, 70 (1976).

[47] Freyer D.H., Garfinkel B.H., Gharavi H.G., *Arbitration under Bilateral Investment Teaties: An often overlooked tool,* MEALY'S International Report. May 1998.

[48] In some cases, the date on which a particular party has *ratified* a BIT may be the most theoretically date. Unfortunately, dates of ratification are typically very difficult to obtain, and where a treaty has been signed but has failed to enter into force, or only entered into force after a long delay, it will usually be impossible for the analyst to determine if the delay or failure is due to one party or the other (or both) without conducting expensive and time-consuming research into the bowels of difficult-to-obtain national legal gazettes. It seems fair to admit that in some cases, constitutionally mandated procedures may delay ratification by the capital-exporting state, which otherwise would seem to have no rational reason to resist ratification. There have been some complaints, for instance, that Belgium's federal system needlessly delays the entry into force of that state's BITs. Willem Van de Voorde, *Belgian Bilateral Investment Treaties as a Means for Promoting and Protecting Foreign Investment*, 44 STUDIA DIPLOMATICA 87, 92 (1991). In other instances (and I suspect these to be the most common) BITs that fail to enter into force fail probably do so because the capital importing state has had second thoughts about the wisdom of the commitment. In any event, if the date of ratification is the date of theoretical interest, the necessary question is whether the date of signing or the date of entry into force is likely to be closer in time to that date.

[49] *See* UNCTAD, "Investor-State Disputes Arising under Investment Treaties: A Review," UNCTAD/ITE/IIT/2005/4 (2006).

[50] Swenson takes a contrary view, arguing that "[i]n some cases…it is likely that investors may invest in the host country before the BIT signing takes place, since the investors confidently anticipate that their [pre-BIT] investment will soon receive further protections when the signing occurs." Deborah L. Swenson, *Why Do Developing Countries Sign BITs?*, 12 U.C. DAVIS J. INT'L L. & POL'Y 131, 147 (2005). The extent to which this might be true is left for the reader to judge; I suspect that the mere possibility that a host state will sometime in the future sign a BIT is rarely if ever a decisive factor in actual foreign investment decisions, even assuming that investors have the wherewithal to identify, monitor, and evaluate the prospects of ongoing and often secret diplomatic negotiations.

[51] SCHREUER, *supra* note 41, at 293 (quoting Art. 12 of the 1991 Switzerland-Ghana BIT).

[52] *Id.* at 213.

[53] *Id.*

[54] A state that has ratified the ICSID Convention agrees to abide by ICSID's rules and is eligible to use the ICSID system to resolve investment disputes. However, merely ratifying the ICSID Convention does not give investors the right to initiate arbitration against the ratifying state; some further expression of state consent to arbitrate is necessary. Thus the need for consents in BITs or elsewhere. *See generally* HIRSCH, MOSHE, THE ARBITRATION MECHANISM OF THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES (1993).

[55] SCHREUER, *supra* note 41, at 219.

[56] *Id.* at 213.

[57] ICSID Convention, *supra* note 46, Art. 45.

[58] *See* Preiswerk, *supra* note 21, at 195.

[59] Wälde, *supra* note 12, at 201.

[60] Michael Minor, *The Demise of Expropriation as an Instrument of LDC Policy*, J. INT'L BUS. STUDIES 177 (1994).

[61] SCHREUER, *supra* note 41, at 216.

[62] But once consent has been given and accepted by the other party, it can be difficult or impossible for one party to withdraw its consent unilaterally. ICSID Convention, *supra* note 46, Art. 25(1). This rule is what makes a BIT pre-consent effective. Once offered by the host state and accepted by the investor, the host state cannot meaningfully avoid its obligation to arbitrate at the investor's choosing.

[63] SCHREUER, *supra* note 41, at 217.

[64] For a comprehensive list and detailed discussion of the early German BITs, see generally Klebes, *supra* note 23.

[65] *See, e.g.*, Art. 11(4)(a) of the 1993 BIT between Australia and Indonesia.

[66] *See* Fernando Cabrera Diaz , "China-Finland investment treaty points to new trend in Chinese BITs," Investment Treaty News, Feb. 14 2007, *at* http://www.iisd.org/investment/itn/.

[67] The failed OECD Multilateral Agreement on Investment being the most recent example. A text of the agreement and various other related documents are available on the OECD website, www.oecd.org.

[68] The original parties to the 1987 ASEAN agreement were Brunei Darussalam, Indonesia, the Philippines, Singapore, and Thailand. Laos, Myanmar, and Vietnam later joined as well. The text of the agreement, as amended and with various protocols, is available on the ASEAN website at www.aseansec.org/12799.htm.

[69] The MERCOSUR text is available at www.sice.oas.org. MERCOSUR comprises Argentina, Brazil, Paraguay, and Uruguay.

[70] This and other Latin American FTAs are available at www.sice.oas.org.

[71] The ECT and associated documents and information are available at www.encharter.org/index.jsp.

[72] A copy of the Arab League treaty is provided in UNCTAD's INTERNATIONAL INVESTMENT INSTRUMENTS: A COMPENDIUM, Vol. II, p. 211. The treaty has been signed by Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Oman, Qatar, Saudi Arabia, Syria, Somalia, Sudan, Tunisia, the UAE, and Yemen, and has been ratified by all of these states except Algeria and Comoros. *Id.*

[73] Fifty-one states have currently signed the ECT; using the standard mathematical formula for calculating combinations of pairs, [N!/((N-2)!*2)), the ECT might be viewed as representing the rough equivalent of 1275 BITs! Of course, that number ignores the need to take into account the ECT's limited sectoral coverage. Many ECT states have also already signed full-fledged BITs with other ECT states, raising an issue of double-counting.

[74] *See, e.g.*, UNCTC 1988, *supra* note 13 at 6 (emphasis added). *See also* UNCTAD, Trends in International Investment Agreements: An Overview, Doc. # UNCTAD/ITE/ITT/13 (1999), at page 21. UNCTAD's claim that the Germany-Pakistan treaty is the first BIT has been widely echoed.

[75] Wilson notes that the "first treaty of this type signed by the United States was the Treaty of Amity and Commerce with France (1778)". ROBERT RENBERT WILSON, U.S. COMMERCIAL TREATIES AND INTERNATIONAL LAW 2 (1960).

[76] For a list and discussion of early French and German FCN-type "establishment" treaties, see ROY PREISWERK, LA PROTECTION DES INVESTISSEMENTS PRIVÉS DANS LES TRAITÉS BILATÉRAUX (1963).

[77] Yoshiro Matsui, *Japan's International Legal Policy for the Protection of Foreign Investment*, 32 JAPANESE ANN. INT'L LAW 1, 3 (1989).

[78] Robin Burnett, *Negotiation of International Agreements in the Field of Commerce and Investment—Problems of Relevance to Newly-Independent States*, 9 J. WORLD TRADE L. 231, 235 (1975).

[79] Herman Walker, Jr., *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 AM. J. COMP. L. 229, 230 (1958).

[80] See Vandevelde, *The Bilateral Investment Treaty Program of the United States* (1988), 207 n. 53 & 60.

[81] Kenneth J. Vandevelde, *Sustainable Liberalism and the International Investment Regime*, 19 MICH. J. INT'L L. 373, 382-83 (1998). Vandevelde provides comprehensive citations to the major historical academic studies of the U.S. FCN program. *Id.* at 383 n.72.

[82] *See, e.g.*, *Case Concerning Elettronica Sicula,SpA (ELSI) (U.S. v. Italy)*, Judgment of 20 July 1989, 1989 I.C.J. 15 (invoking the U.S.-Italy FCN on behalf of U.S. investor whose Italian plant had been protesting Italian workers); *Sumitomo Shoji America, Inc., v. Avagliano*, 457 U.S. 176 (1982) (invoking the U.S.-Japan FCN to challenge the applicability of American anti-discrimination laws to Japanese investors)

[83] This is a point very well made by Sachs in regard to the United States BIT program. Wayne Sachs, *The "New" U.S. Bilateral Investment Treaties*, 2 INT'L TAX & BUS. LAW. 192 (1984). The inverted commas indicate Sachs' deep skepticism about the novelty of the U.S. effort, which, as Sachs demonstrates convincingly, draws much more deeply on the U.S. FCN treaties than most observers acknowledge.

[84] The Organization of American States (OAS) provides a comprehensive list and links to the full texts of these and other inter-American trade and investment agreements. http://www.sice.oas.org.

[85] European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 1, Mar. 20, 1952, art. 1, 213 U.N.T.S. 262 ("Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law"). For a discussion of international cases brought under Protocol 1, Article 1, see Jon A. Staley, *Keeping Big Brother out of Our Backyard: Regulatory Takings as Defined in International Law and Compared to American Fifth Amendment Jurisprudence*, 15 EMORY J. INT'L L. REV. 349, 381-380 (2001).

[86] Been & Beauvais, *supra* note 25, at 55.

[87] This seems to be Guzman's view, for instance. *See generally* Guzman, *supra* note 10.

[88] The OECD Declaration and Decisions on International Investment and Multinational Enterprises commit adhering states to provide national treatment to each other's foreign investors. Mexico, Korea, the Czech and Slovak Republics, Poland, Hungary, and Turkey, all members of the OECD, have signed on, as have a number of non-OECD developing countries, including Argentina, Brazil and Chile. OECD members have also adhered to "codes" of "Liberalisation of Capital Movements" and of "Liberalisation of Current Invisible Operations." The codes "constitute legally binding rules, stipulating progressive, non-discriminatory liberalisation of capital

movements, the right of establishment and current invisible transactions (mostly services)." Compliance is encouraged through what the OECD calls "peer pressure exercised through policy reviews and country examinations to encourage unilateral rather than negotiated liberalization." The quote is from the OECD website, www.oecd.org/document/63/0,2340,en_2649_34887_1826559_1_1_1_1,00.html.

[89] *See, e.g.*, Partnership and Cooperation Agreement between the European Communities and their Member States and the Republic of Moldova, signed Nov. 28, 1994, O.J. L181/27.

[90] In some instances the acceptance of an international institutional alternative to BITs may legally *preclude* a host state from also securing an investment treaty. For example, French law prohibits the French government from signing BITs with African states that have the CFA currency union. *See* Patrick Juillard, *Les conventions bilatérales d'investissement conclue par la France,* 106 J. DROIT INT'L 274, 282-83 (1979).

[91] Guzman, *supra* note 10, at *Id.* at 644.

[92] *See, e.g.*, A.A. Fatouros, *The Quest for Legal Security of Foreign Investments, Latest Developments*, 17 RUTGERS L. REV. 257, 268-69 (1963) (discussing the "great number of statutes relating to the regulation and encouragement of foreign investments" that came into effect in the developing world in the early 1960s).

[93]Elizabeth Asiedu & Donald Lien, *Capital Controls and Foreign Direct Investment*, 32 WORLD DEVELOPMENT 47(2003).

[94] *See generally* LOWENFELD, *supra* note 24.

[95] See in particular the Greek Investment and Protection of Foreign Capital Act of 1953, LD 2687/1953, which is reprinted in Oceana Publications' looseleaf series INVESTMENT LAWS OF THE WORLD. The law promised that foreign investors would enjoy non-discriminatory treatment, that expropriation would be accompanied by payment of "full value", as determined by agreement or by international arbitration.

[96] FATOUROS, *supra* note 7, at 186.

[97] *Id.* at 187 (discussing municipal law-based promises to arbitrate disputes related to investments in the petroleum sector in India, Pakistan, Greece, Libya, Morocco, Iran, and Mali).

[98] Lovells, Client note: Protecting investments overseas: Bilateral Investment Treaties, Foreign Investment Laws, and ICSID Arbitration 2 (July 2005), discussing Ibrahim F.I. Shihata & Antonio Parra, *The Experience of the International Centre for Settlement of Investment Disputes*, 14 ICSID REV.-FOREIGN INVEST. L.J., 299, 303 n. 2 (1999). The count does not reflect investment laws that might contain state promises or pre-consents to non-ICSID arbitration, and hence is probably underinclusive. For a concrete example, see Ghana's 1994 Investment Promotion Center Act and its 1986 Minerals and Mining Law, both of which "provide for arbitration when disputes cannot be settled by other means." United States Department of State, Ghana: 2004 Investment Climate Statement. Municipal law pre-consents have occasionally produced published arbitral awards. *See, e.g.*, SPP v. Egypt, Decision on Jurisdiction, 14 April 1988, 3 ICSID Rep. 142/3; Tradex v. Albania, Decision on Jurisdiction, 24 Dec. 1996, 14 ICSID REV.—FOREIGN INVEST. L.J. 161 (1987).

[99] Dirk U. Stikker, The role of private enterprise in investment and promotion of exports in developing countries, UN Doc. # TD/35/Rev.1, ¶ 119 (1968). A headline in the Wall Street Journal greeting changes in Brazil's constitution illustrate the point: "Multinational Miners Really Dig Brazil—Catalyst Is the Easing Of Curbs on Foreign Ownership" (Matt Moffett, Jan. 22, 1997, p. A10).

[100] Ewell E. Murphy, Jr., *Access and Protection for Foreign Investment in Mexico under Mexico's New Foreign Investment Law and the North American Free Trade Agreement*, 10 FOREIGN INVESTMENT L.J.–ICSID REV. 54, 58 (1996).

[101]MAXWELL A. CAMERON & BRIAN W. TOMLIN, THE MAKING OF NAFTA: HOW THE DEAL WAS DONE 123, 125 (2000).

[102] As Sornarajah points out, in the typical international sales transaction the relationship is an arms-length one between private parties that, individually speaking, "has minimum impacts upon policy or other interests of the states with which the transaction would come into contact. It is not an intrusive transaction in that very little conduct relating to it takes place in either country and the duration of the course of that transaction is short." Thus the importing state typically has little incentive to invest in costly contracting with individual traders as to the importing state's obligations in regard to that particular trade, and is content to set trade policy on the national level while granting the private parties to the trade transaction relatively complete autonomy to structure their deal in the way the parties see fit. M. SORNARAJAH, THE SETTLEMENT OF FOREIGN INVESTMENT DISPUTES 228 (2000). The one principle exception to this rule was the practice of the socialist states' state trading entitites of including arbitration agreements in their international trade contracts. HENRY CATTAN, THE LAW OF OIL CONCESSIONS IN THE MIDDLE EAST AND NORTH AFRICA 142 n.8 (1967).

[103] Burnett, *supra* note 78 at 237. On natural resources investment contracts generally, see, e.g., DAVID N. SMITH & LOUIS T. WELLS, JR., NEGOTIATING THIRD-WORLD MINERAL AGREEMENTS: PROMISES AS PROLOGUE (1975); E.E. SMITH ET AL., INTERNATIONAL PETROLEUM TRANSACTIONS (2000).

[104] *See generally* J. LUIS GUASCH, GRANTING AND RENEGOTIATING INFRASTRUCTURE CONCESSIONS: DOING IT RIGHT (2004).

[105] For example, host states may enact relatively unfavorable national investment laws that are intended only as a prelude to the possibility of more favorable treatment extended on a project-by-project basis. In this case, municipal law represents the first stage in a bargaining process between the host state and the foreign investor. This appears to have been the case for the members of the Andean Common Market in the 1970s, which largely for domestic political reasons adopted an outwardly hostile policy toward foreign investors, but which were willing to grant foreign investors much more favorable terms of entry and operation as an exercise of discretion. *See generally* FRANCOIS J. LOMBARD, THE FOREIGN INVESTMENT SCREENING PROCESS IN LDCS: THE CASE OF COLOMBIA, 1967-1975 (1979). As Lombard concludes, "foreign investors have to be aware that behind strict rules there exist possible ways to reach operational agreements." *Id.* at 126. C. Fred Bergsten has described this situation as one of "carrot and stick" whereby "[i]n essence, a bargaining process is created; both sides probe for maximum advantage until a deal acceptable to both is struck." U.S. Policy Toward International Investment, Hearings Before the Subcommittee on International Economic Policy of the Committee on Foreign Relations, United States Senate, July 30, Sept. 20, and Oct. 28 1981, p. 14.

[106] This is Schaufelberger's opinion, for instance. As he notes,

> le juriste tient en ses mains le plus efficace instrument de protection des investissements: la rédaction d'un contrat *précis et équitable*. Il peut on outre compléter le système de protection par l'insertion dans le contrat de clauses d'arbitrage, d'élection de droit, et de stabilisation.

Peter Schaufelberger, *La protection juridique des investissements internationaux dans les pays en développement: Etude de la garantie contre les risques de l'investissement et an particularier de l'Agence multilatérale de garantie des investissements (AMGI)*, 83 ETUDES SUISSES DE DROIT INTERNATIONAL 132 (1993).

[107] *Id.* at 134.

[108] SMITH & WELLS, *supra* note 103, at 30.

[109] *Id.* at 37-53.

[110]*Compagnie Générale des Eax v. Argentine Republic*, ICSID Case No. ARB/97/3, ¶26.

[111] Debora Spar, Attracting High Technology Investment: Intel's Costa Rican Plant, Foreign Investment Advisory Service Occasional Paper 11 at 11 (1998).

[112] For example, Article 9 of Côte d'Ivoire's 1959 foreign investment law provides that an "establishment agreement will set and guarantee the conditions of operations from which of the approved [foreign] enterprise will benefit." The law, number 59-134 of September 3, 1959, is reprinted in Oceana Publications' loose-leaf series *Investment Laws of the World*. Guinea's 1962 foreign investment law and Cameroon's 1964 law provide similar examples.

[113] See, for example, Article 2 of the 1980 BIT between Singapore and Sri Lanka, which requires "approval in writing" by government officials.

[114] As Tawil explains, "En general, los países de la regíon [of Latin America], han preferido la negociacíon directa, con los inversiones, aduciendo, que tales tratados con los países industrializados no resultan equilibrados, obligándolos a asumir costosos compromisos a largo plazo, sin imponer responabilidades similares a sus cocontratantes." Guido Santiago Tawil, *La crisis latinoamericana y algunas perspectives de cambio en la regulación de las inversions extranjeras en la regíon*, LA LEY 1988-A, 871 n 17.

[115] Peru, for instance, gives investors who enter an investment contract with the state the right to benefit from a special legal regime guaranteeing "legal stability" as to tax, currency repatriation, and national-treatment laws for ten years from the date of contract execution. See Title II of Peru's 1991 Foreign Investment Promotion Law (Legislative Decree 662). The availability of the "stability regime" depends on the investor's willingness to contractually undertake certain obligations relating to the size of the investment and its employment and export effects.

[116] Meron notes this particular requirement in regard to the United States and Canadian investment insurance programs. THEODOR MERON, INVESTMENT INSURANCE AND INTERNATIONAL LAW 62, 126.

[117] France, for example, has conditioned availability of its insurance on a host state's willingness to enter a "specific engagement" with the investor which must contain the host state's consent to ICSID arbitration. See, for example, Article 2 of the 1972 France-Tunisia Treaty Concerning the Protection of Investments, reprinted in Oceana Publication's looseleaf series "Investment Treaties of the World."

[118] See generally CATTAN, *supra* note 102, at Chapter VI.

[119] From the perspective of the petroleum-sector investor, "recourse to national courts is unthinkable and unrealistic [irréalisable]", making arbitration clauses a fundamental necessity in the contracts. Jacques Logie, *Les Contrats Pétroliers Iraniens*, 1 REVUE BELGE DROIT INT'L 392, 410 (1965).

[120] The Côte d'Ivoire law cited *supra* note 112, is again indicative but by no means unique. Article 10 provides that "the resolution of disputes resulting from the application of provisions of an establishment agreement and the eventual determination of any indemnity owed because of a breach of engagements undertaken will be governed by an arbitral procedure which will be set out in each [establishment] agreement."

[121] See the France-Tunisia treaty cited *supra* note 117.

[122] See, e.g., France's 1973 BIT with Indonesia.

[123] For example, UNCTAD reports that Peru "has concluded over 400" state-investor contracts, and that the practice of extending substantive and procedural promises to investors through investment-specific agreements "may be increase[ing]". UNCTAD, Issues related to international agreements: Investor-State disputes and policy implications 16 n.9, TD/B/COM.2/62.

[124] Fatouros suggests that by the early 1960s, investor-state arbitration clauses were "frequently included in agreements between states and foreign nationals or companies…usually describe[ing] in detail the procedures to be followed in case of dispute." FATOUROS, *supra* note 7, at 187.

[125] *See, e.g.*, Denise Manning-Cabrol, *The Imminent Death of the Calvo Clause and the Rebirth of the Calvo Principle: Equality of Foreign and National Investors*, 26 LAW & POL'Y INT'L BUS. 1169 (1995).

[126] *See, e.g.*, Oliver Williamson, *Credible Commitments: Using Hostages to Support Exchange,* 73 AMER. ECON. REV. 519 (1983).

[127] Debora Spar, "Attracting High Technology Investment: Intel's Costa Rican Plant", Foreign Investment Advisory Service Occassional Paper 11 (April 1998), at 9, 14-15.

[128] Wälde, *supra* note 12, at 204-06 (emphasis added).

[129] Guzman, *supra* note 10, at 644.

CHAPTER THREE

PARTISANSHIP AND INVESTMENT TREATIES

§ 3.1: Introduction

The aim of this Chapter is, most generally, to explore the important question of why developing countries sign BITs with the world's major capital exporters. I examine in particular the ways in which the partisan character of government affects the tendency of developing countries to embrace BITs as part of their economic development strategy. Like most current empirical and theoretical work in international relations, I assume that developing countries are rationalistic in their international activities: state leaders will be most likely to enter into investment treaties when it is in their "interest" to do so, that is, when they expect the benefits of the treaties to outweigh the costs. I argue that perceptions of the costs and benefits of the treaties are likely to be filtered through a partisan lens. In particular, when the executive or legislature is dominated by leftist or nationalist political parties, we should expect to see that the host state is less likely to sign or to ratify a BIT. I suggest that this relationship should hold because political parties embody particular economic ideologies that act as lenses through which party leaders and party members evaluate the costs and benefits of particular policy initiatives. Partisans of the left are likely to view the costs of BITs to be particularly high and the benefits rather low, absent strong evidence to the contrary. But where evidence mounts that leftist economic ideas are wrongheaded or unsuccessful, we should expect to see partisan differences in the willingness to enter into BITs to decline as party leaders adjust their calculations of costs and benefits to converge on a common model. In Section II I develop the theoretical argument. Section III presents results from a large-N empirical analysis that uses negative binomial regression techniques to model the likelihood that a given host state

will ratify an investment treaty in a given year. The results of the empirical exercise offer some support for the theory. Partisanship matters in the expected direction, but only for the period prior to the collapse of the Berlin Wall and the emergence of the "Washington Consensus" as the preferred model of economic development. Less expectedly, after the end of the Cold War leftist governments appear to have embraced BITs much more strongly than governments of the right.

§ 3.2: The Importance of Partisanship

Scholars of what might be called "international public policy," like scholars of international relations more generally, tend overwhelmingly to analyze state action in the international sphere as the product of a rationalistic decision-making process, in which a unitary state pursues its "national interest." What the national interest *is*, and how precisely to achieve it, is primarily if not solely defined objectively on the basis of certain "structural" characteristics, broadly understood to include the formal and informal domestic and international institutions in which political actors act and which constrain their autonomous behavior. (While some analysts treat "structure" (usually meaning international anarchy) as distinct from "institutions", I follow Wendt in treating the concepts as essentially the same).[1]

We can identify three main strands of structural theories of international public policy. For *structural realists*, the structure that matters is primarily international (or "systemic") in nature, and is embodied in such basic concepts as the "balance of power," reflecting variables such as the balance of material possessions and (or) military capabilities. Waltz, of course, provides the most well-known and influential statement.[2] Different flavors of structural realism co-exist (sometimes uneasily) in the literature,[3] but the basic view is that a state's foreign policies are driven primarily by the state's power position in an "anarchic" international system. The international system, very narrowly construed, defines the state's international policy interest (increasing its "power" or "security") and the manner in which it pursues it (e.g. through balancing alliances).

Neo-liberal institutionalists, perhaps exemplified best by Robert Keohane,[4]take a broader view of the structure that matters. The focus remains on the international structure, but it expands to admit that international institutions, whether relatively formal, such as the World Trade Organization (WTO) or the North Atlantic Treaty Organization (NATO), or more informal, such as international "norms", might meaningfully help both to define the national interest and to provide a rational means of achieving it by promoting and supporting cooperation for joint gain.

And third, an alternate strand of neo-liberal theory, which I call *state-centered liberalism*, has broadened the analytic focus to include domestic structures as drivers of international policy. These domestic structures may again be relatively informal, including such concepts as national "cultures"[5] or transnational "civilizations."[6] But it is far more common to focus on the more formal aspects of domestic governance structures to define various "types" of states. The most common and most important typology to emerge in the literature is that of democratic versus non-democratic regimes. Whether a state is a democracy has been said to influence a bewildering array of international phenomena. For example, democracies are said to be less likely to initiate wars;[7] more likely to keep their international promises; less likely to restrict trade flows; more likely to treat foreign investors favorably; but less likely to use tax incentives to attract foreign investment.

These various structural approaches share an important common characteristic. Whether the focus is on the international structure narrowly or broadly construed, or on the contributions of the domestic structure in which agents of the state operate, implicit in all three views is the idea that the international policies that a particular state will pursue at a particular time will not depend on *who* controls the state. States may be "weak" or "strong" in terms of the international balance of power; they may be more or less integrated into the most important international institutions; they may be more or less democratic, or they may exemplify one culture or civilization or another. In other words, each approach

necessarily admits that states may differ in theoretically relevant ways in terms of their structural positions and structural characteristics, even if the approaches differ as to the degree and quality of theoretically relevant differentiation. But given a particular state in a particular structural position and with particular structural characteristics, mainstream international relations theory would not expect the identity of the national leadership—of those who actually choose the international policies to pursue, and the means of pursuing them—to meaningfully affect either the choice of policy goals or the means of pursuit. The "state," viewed as a unitary actor, is the unit of analysis. The people actually acting as the state's agent in the international arena are given short theoretical shrift.

The principle weakness of the "state-as-actor" models that dominate mainstream international relations theory is, then, that they leave largely unaddressed (but implicitly answered in an unsatisfactory way) the important question of "whether man and his societies pursue goals of their own choosing or are moved toward those imposed upon them by forces which are primarily beyond their control."[8] This is certainly not a new observation. Singer's well-known 1961 essay addressing the "level-of-analysis problem in international relations", the source of the immediately preceding quotation, makes the point well, as does work by Wagner, Keohane and Nye, Allison, and others in the 1970s that sought to "dissolve" or to disaggregate the state's role in forming international policy, both by looking at transnational actors situated *hors* the state and at groups and individuals comprising the state.[9] But in the intervening years international relations theory has been largely consumed by debates between structural realists and institutionalists over whether international institutions "matter", and between realists and state-centered liberals over whether it is theoretically necessary, or even analytically worthwhile, to differentiate state actors on the basis of domestic structural characteristics. Lost in the shuffle has been much sustained concern with peeling back the abstract skin of the state to identify theoretically relevant agent-level differences in the people that run it.

The predictable result of this state of affairs is that domestic politics in the quotidian sense, in which different actors with different views of the world vie for control of the reins of state, with the selectorate acting as if much hinges on who succeeds in seizing them, is largely missing from accounts of the international policy-making process. This lacuna represents, as Singer noted long ago, one of the "more significant implications and fascinating problems raised by the adoption" of a "state-as-actor" model of international public policy.

The idea that "states" "act" internationally is well-recognized to be a simplifying assumption, and one that in many cases is probably well-warranted on the basis of theoretical parsimony. But as a matter of descriptive accuracy that can have important implications for predictive accuracy, it is worth revisiting the relatively obvious but too frequently ignored point that states are indeed abstractions on whose behalf actual *people* act, and that those peoples' "beliefs and convictions", "experiences, images, and expectations" may play a very important role in determining how the "state's" goals are defined and the ways in which those goals are pursued.[10]

It is in something approaching this sense that Byman and Pollack have recently called on international relations scholars to "bring the statesman back in".[11] Recalling Waltz's famous division of the discipline into three "images" of international politics, Byman and Pollack note that international relations scholars, including Waltz himself, have almost entirely avoided any exploration of the "first" image, in which international events are supposedly driven in large part by variance in the "human nature" of individual leaders. Instead, analysts have focused almost entirely on the second image, in which international politics are viewed as primarily driven by domestic political structure (state-centered liberals, in my typology above), or on the third image, in which "the behavior of nations is driven by their relative position…in an anarchic international system",[12] with the relevant system either narrowly construed as by structural realists or more broadly construed as by neoliberal institutionalists.

But it is becoming increasingly difficult to keep first-image theory from taking its seat at the international relations table. In recent years a number of scholars in both international relations and comparative politics have resurrected and greatly expanded upon Weber's claim that the subjectively held ideas of policymakers operate as the "switchmen" of history by "determining the tracks along which action has been pushed by the dynamic of interest."[13] Ideational theory has enjoyed its most recent renaissance in the field of comparative political economy, which typically defines ideas as "subjective claims about descriptions of the world, causal relationships, or the normative legitimacy of certain actions."[14] For ideational theorists these subjective beliefs do more than to simply "rationalize strategies chosen for other [e.g. objective] reasons." Instead, the claim is that subjective beliefs actually serve to guide policymakers' actions.[15] The approach has been used with some success to identify the effects of changing ideas on such diverse phenomena as the realization of the post-World War II "class compromise" and the rise of the welfare state upon which the compromise was based,[16] decolonization,[17] and the development of the European Union.[18]

Ideational theories are often contrasted with rational choice theories of public policy, though in fact the two approaches are hardly incompatible. Rational choice theories purport to identify an actor's supposedly "objective" interest—e.g. power, votes, money—and posit that the actor will rationally seek to maximize that interest within given institutional constraints. The key difference between rationalist and ideational accounts of public policy is that in rationalist accounts it is the analyst who stipulates what the actor should be expected to desire, based on the analyst's understanding of the actor's objective position, and it is likewise the analyst who stipulates how, precisely, the actor should be expected to most efficiently achieve that desire.[19] By implication, and absent some sort of Darwinian natural selection process, the actor himself is also aware of his objective interests, and of how to best achieve them. In its most extreme view, this approach leads to the "de-emphasis of ideas in and of themselves, since they are seen mainly as a thin disguise for the play of interests and power…what Clifford Geertz has called the 'interest theory' of ideology, where ideas are seen as a 'mask and a weapon.'"[20]

An ideational approach, in contrast, emphasizes that an actor's goals are not fixed and predetermined, but rather reflect his mutable and subjective "beliefs about the nature of the universe, and about right and wrong," that is, about what he would like to achieve.[21] Nor can we expect the actor to always choose the "best" way to achieve those goals, as the particular path chosen will itself depends on the actors' equally subjective and mutable causal beliefs.

Ideational theory is relevant for first-image approaches to international public policy precisely because it tends to focus the analyst's attention on the ideas held *by policy-makers*.[22] As Mowle has recently put it in the foreign policy context, and as in any other policy context,

> individuals within the state…direct purposive action…
>
> …
>
> A state's behavior is not reflexive; rather, it flows from the way its foreign policy decision-makers understand what is happening….[their] assumptions—which include images of other actors in the world, causal beliefs about how they interact with one another, and prescriptions about appropriate courses of action—constitute a "worldview". The worldview influences the way individuals interact with reality.[23]

In other words, ideational theory suggests quite strongly that there is good reason to expand our analytic focus beyond international and domestic structural variables to include *agent-centered* variables—precisely the beliefs, convictions, experiences, images, and expectations ("ideas", broadly construed) that Singer found lacking in international relations theory long ago.

What do ideas, again, broadly construed, have to do with BITs? This Chapter's central argument is that the BIT phenomenon cannot be adequately understood without recognizing that it is based in large part on particular ideas, held by *people in power*, about the value of FDI in promoting economic development, and about the value of BITs as a tool to encourage that investment. Ideational approaches do, of course, face well-known limitations, including most prominently the problems of determining

which ideas policymakers actually and sincerely hold, and which ideas they espouse merely as "intellectual rationales" for actions taken on the basis of unspoken objective interests.[24] In consequence, ideational theories have had great difficulty empirically demonstrating simple causation, *e.g.* that ideas actually do, rather than just should, matter. Ideational theory also frequently fails to adequately demonstrate the relative influence of ideas compared to arguably non-ideational factors, like coercion or "power." And finally, first image theories that focus on individually held ideas risk quickly degenerating into "great man" theories of history that offer little or no prospect of generalizability. Byman and Pollack's attempt to "bring the statesman back in" falls into precisely this trap by emphasizing Hitler's supposedly "unique" combination of ideas and psychological traits as the defining cause of World War II.

These are indeed serious problems, and I do not attempt to fully resolve them here, either theoretically or empirically. But I do insist that our ability to test the independent impact of ideas on policy is not necessarily intractable if we can reasonably associate the sincere holding of one policy idea or another with the particular political groups that control the levers of government. In other words, I attempt to move from a simple assertion that "ideas matter" or that "individuals matter" to something approaching a theory of *when* certain individuals, holding certain ideas might matter.

My most basic claim is that the decision to sign and ratify a BIT is rationalistic in the sense that the political leaders of a given developing country will tend to sign and ratify investment treaties when they view the likely benefits of doing so to outweigh the likely costs. What makes "ideas" relevant conceptually is that certain political actors are likely to view the costs of BITs to be quite high; others are likely to view the costs as low, both within a particular developing country and over time. A similar story can be told as to benefits. *Given these differences in opinion among political actors, differences which correspond approximately to the partisan identity of the decision-maker, the outcome of the policy-making process—the decision to enter into or to forgo a BIT—will necessarily depend on who is authorized to perform the relevant calculations.*

This is not to say that partisan preferences are set in stone, and that leftist leaders always do *x* while rightist leaders always do *y*. Over time, as evidence of the costs and benefits of particular courses of action shift and change, or become more clear, we can expect partisan positions to shift as well, and perhaps even to converge or to switch places. Partisans, in other words, are not immune to "policy learning," either in the narrower sense of adapting their preferred methods of achieving a particular goal, or in the broader sense of shifting their understanding of the goal itself. As Fidel Castro, a long-time opponent of foreign investment, surprisingly admitted in a 1993 speech celebrating the 40th anniversary of his assault on the Moncada Barracks, "[w]ho would have thought that we, so doctrinaire, we who fought foreign investment, would one day view foreign investment as an urgent need?....Greater opening for foreign investment is one of the solutions we have to tackle the difficult situation we face."[25] The speech was soon followed by dramatic changes in Cuban foreign investment laws, in which full repatriation of profits and full foreign ownership were allowed for the first time since the revolution.[26]

But the possibility of policy learning does not mean that policymakers are also not immune to the occasional, or even the frequent or long-lived, partisan *idée fixe*. Partisan ideological rigidity is a measurable fact of life, and it may even be viewed as rational, as Sánchez-Cuenca has recently argued.[27] It is the orderly and predictable distribution of these relatively fixed ideas that makes it possible to present a partisan-based, ideational, first-image theory of international public policy. Consider, for example, the following simple world, in which the costs and benefits of entering into a BIT can be either "high" or "low":

Table 3.1: The Costs & Benefits of BITs

		Costs of BITs	
Benefits of BITs		**High**	**Low**
	High	?	Sign BIT
	Low	Refuse BIT	?

If the relevant political actors believe the costs of BITs to be low, and the benefits high, then the host state is likely to sign the treaty. If the relevant political actors' beliefs are the opposite, then we would expect the host state's leaders to refuse to sign and ratify the treaty. And when the relevant political actors believe the costs and benefits to be in rough equipoise, the best decision remains (subjectively) uncertain, and the actual decision made difficult to predict *ex ante*.

The main task an ideational theorist faces in predicting the policy outcome lies thus in identifying the particular power-holder's likely views on costs and benefits. State-centered structural theory suggests that there is but one "objective" view, and that all relevant political actors in the particular state will share it. Ideational theory suggests in contrast that different political actors may hold different subjective views, which in turn suggests that the actual and observed policy outcome may necessarily depend on who decides the policy.* The analytic problem is that absent a theory of idea-holding, the ideational theorist is unable to predict *a priori* what the policy outcome will be, even if the theorist knows who the decision-maker is. After the fact of decision it may be relatively easy to impute certain ideas to the decision-maker and to argue, and even to argue convincingly, that those ideas "mattered" in influencing the decision. But retrospective and *ad hoc* explanations of this sort, no matter how convincing, are a far cry from the generally applicable predictive theories upon which social science places justifiably high value.

Partisanship offers a potential foundation to move from *ad hoc* idea-based explanation to prediction. Consider once again the simple world initially presented above and slightly complicated in its present version:

* Strictly speaking, ideational theory is also capable of producing state-centered theories of policy outcomes. For instance, Wendt's constructivist theory of international politics attributes "ideas" to states, and not to particular actors within the state, an approach which minimizes the importance of variation in the ideas of individual policy-makers.

Table 3.2: Partisan Evaluation of the Costs & Benefits of BITs

		Costs of BITs		
Benefits of BITs			**High**	**Low**
		Partisan Character of Government	*Left*	*Right*
	High	*Right*	-	Sign BIT
	Low	*Left*	Refuse BIT	-

Imagine that decision-makers that ascribe to "leftist" political-economic ideologies are generally more likely to view the costs of BITs to be high and the corresponding benefits to be low. By "leftist" I mean a political-economic worldview that emphasizes the value of government interventionism in the economy. And imagine that decision-makers on the political-economic "right" are likely to take the view that BITs offer high benefits while imposing low costs. By "right" I mean a political-economic worldview that emphasizes the value of *laissez-faire* economic policies and restrictions on government intervention in the economy. And finally imagine that decision-makers reliably reveal their political-economic ideologies by membership in ideologically identifiable and distinct political parties. We are now in a position to offer powerful and testable first-image predictions on the basis of a relatively small amount of information: when a state is led by a member or members of a leftist political party, the state will be less likely to enter into a BIT; when a state is led by a member or members of a rightist political party, the state will be more likely to enter into a BIT.

Why might political partisanship be a reliable guide to a policymaker's subjective policy preferences, and ultimately to his policy decisions? Consider first the long body of cognitive research in the field of political behavior that demonstrates the commonplace tendency of ordinary voters to use cognitive heuristics to make political decisions or to form political opinions on issues in the face of insufficient objective information. Voters typically turn first and foremost to a candidate's party affiliation and ideological position to gauge the candidate's position on a given issue. As Laue and

Redlawsk have recently noted, "[p]arty and ideological stereotypes or schemata are among the richest and most widely shared in American politics."[28] And Brewer and Steenbergen have recently shown that voters' views on "human nature" provide an "information shortcut" that informs their views on foreign policy issues.[29]

Voters are not national leaders deciding weighty issues of foreign policy, of course. National leaders tend to have more and better information than voters, especially on foreign policy issues, and to have a much greater personal stake in the outcome of a particular foreign policy decision than does an individual voter deciding for whom to vote or formulating and expressing a layman's political opinion. But it is still quite reasonable to assume that national leaders, when formulating their own foreign policy preferences, will also turn to "[p]arty and ideological stereotypes or schemata" when attempting to determine and to weigh the relative costs and benefits of a given policy action, especially in the face of uncertainty as to what the "objective" costs and benefits actually are. The decisions that foreign policymakers must make can be exceptionally complex, and a growing body of empirical evidence suggests that in the face of such complexity, decision-makers, like voters, tend indeed to use various sorts of heuristics. For example, recent experimental research suggests that foreign policy decision-makers are especially likely to rely on heuristics in "low threat" situations,[30] which reasonably would include most foreign policy issues in the field of international economic relations, including FDI policy. In this vein it is worthwhile to note Tugwell's observation, in his excellent case study of Venezuelan foreign investment policy in the petroleum sector in the 1960s and 1970s, that

> the role of doctrine or ideology seems to be critical: it provides a filter for information, a source of new bargaining positions, and a guide and justification for policy as a whole…. The role of a strong and consistent doctrine in Venezuela's petroleum policy adds support to [the] argument…that the form and content of elite ideology can be of central importance in determining the quality of development policy. In the management of dependence, it would seem especially important in determining whether a moderate, incremental, and experimental approach is possible or whether policy-makers will turn to a more extreme response, either submissiveness or xenophobic reaction.[31]

Foreign policy heuristics are likely to comprise what Mowle calls "world views." World views "do not spring randomly from each individual's unique experiences, but…are learned through a combination of formal study and socialization with other policymakers."[32] This "socialization" is most likely to take place within a partisan environment, in which members of the same political party routinely interact with each other on campaigns and in committees and caucuses, creating and transmitting shared "mental model[s] of goals, constraints, preferred solutions, and expectations about the effectiveness of various tactics."[33] For example, Marks, Wilson, and Ray have provided powerful cross-national evidence that "ideological prisms" along familiar lines of political cleavage drive political parties (and, by implication their members and representatives in office) of similar "families" to adopt similar positions on European integration.[34] As Marks and Wilson argue in a related study,

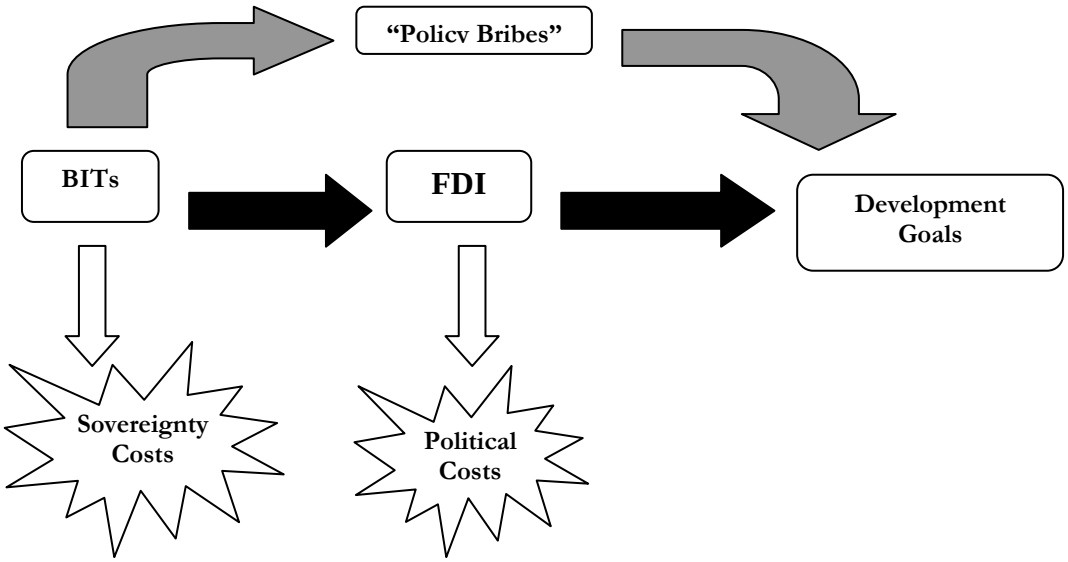
> Political parties are not empty vessels into which issue positions are poured in response to electoral or constituency pressures; rather, they are organizations with historically rooted orientations that guide their response to new issues. The range of a political party's likely response to a new issue is therefore a product of the ideologies of party leaders and the endogenous constraints of party organization, constituency ties and reputation. In other words, a political party has its own 'bounded rationality'… that shapes the way in which it comes to terms with new challenges and uncertainties.[35]

An important line of work in the comparative welfare states literature provides strong confirmation that partisanship can be a powerful predictor of domestic public policy outcomes. Most prominently, Huber and Stephens provide extensive case-study and statistical evidence that the partisan identity of government decision-makers strongly influences the development of welfare state policies.[36] More recent empirical work has confirmed this general relationship between government partisanship and social policy.[37] And of course, a long line of research on the formation of trade policy in the United States suggests that "party and ideology … capture parsimoniously a good deal of variation in floor voting" on international trade issues, at least in the United States Congress.[38]

What this means for the present analysis has already been suggested: if we can identify shared partisan "world views" on FDI policy generally, and on BITs in particular, we can predict whether

particular national leaders, or particular national governments, are likely to sign and ratify the treaties. Take the following flow chart as a more complicated illustration of the simple world first introduced above.

Figure 3.1: Informal Model of BIT Decision Calculus



The basic causal rationale of BITs is illustrated by the black arrows, and is familiar by now to the reader: BITs are expected to lead to increases in FDI; FDI is valued because it helps to further the developing country's "development" goals, whatever those may be.

The grey arrows indicate a complementary, and alternate, causal story: the possibility that capital exporting countries may offer "bribes" to developing countries that agree to enter into BITs, such as tying acceptance of a BIT to support for the developing country's entry into the World Trade Organization, or to access to World Bank or International Monetary Fund lending, that may also help the developing country to achieve its development goals independent of any effect that BITs might have on FDI flows. Hard evidence of such bribes is difficult to unearth, but it is both interesting and relevant that the World Bank's Multilateral Investment Guarantee Agency (MIGA) has reportedly "encouraged

the adoption of BITs as a test to ensure that investments are sufficiently protected" to merit the provision of insurance.[39] This suggests the rather ironic possibility that host states may have signed certain BITs not because the *treaties* reduce the investor's risk, but because signing the treaties allows the investor to insure against the risk.[40] There is also evidence that capital exporting states have similarly "bribed" developing countries into signing BITs by making the availability of home state-sponsored insurance contingent on the adoption of a BIT.[41] The United States has also long made the availability of foreign aid contingent upon a willingness to settle investment disputes by arbitration, and in at least one case has used its influence in a multilateral development bank to block funding for a project where the host state (Costa Rica) was resisting an investor's demand for arbitration in an unrelated dispute. [42] Whether similar pressures might encourage states to sign BITs with the United States remains less than fully explored, but the U.S. business lobby, in voicing its support for the U.S. BIT program, has explicitly urged the government to "consider the extent to which countries' investment policies may have foreclosed development by private capital" before extending official aid or supporting loans from "multilateral development… institutions."[43]

The white arrows illustrate that BITs and increased FDI can impose certain costs on domestic politicians. We have seen in the previous Chapter that BITs, especially strong ones, risk imposing potentially serious constraints on a host state's ability to change policies in ways that adversely impact foreign investors, something that I refer to as the "sovereignty costs" of the treaties. Increased foreign investment also imposes costs in its own right. I call these "political costs." Political costs might primarily include the loss in popular political support that politicians suffer when constituents perceive foreign companies to be "taking over" symbolically or economically important sectors of the domestic economy. We can think, for instance, of the political uproar that accompanied much of the foreign investment in the United States by the Japanese in the 1980s (and especially the Japanese purchase of the Seattle Mariners' baseball franchise), and the more recent controversy over Dubai Ports World's investment in the operation of United States maritime ports.

Whether a given state will enter into a BIT will be determined by the state's leaders' rationalistic weighing of the various costs and benefits *as the leaders perceive them to be*. More formally, but still quite simply, we can specify that a developing country will sign and ratify a BIT when

$$E(C_S) + E(C_P) < E(B_D),$$

Where $E(C_S)$ are estimated sovereignty costs, $E(C_p)$ are estimated political costs, and $E(B_D)$ are the development benefits that are expected to arise from the additional foreign investments induced by entering into a BIT, or from the "policy bribes" offered to induce acceptance of a treaty. These expectations can be expected to vary along partisan lines in predictable ways.

First take the sequence of black arrows. The policymaker must necessarily estimate the probability that BITs will lead to more FDI, and that more FDI will advance the policymaker's policy goals. These are, at heart, *causal* expectations that *x* causes (or doesn't cause) *y*. The first causal idea, that BITs cause FDI, may seem inherently "objective" in character, as it presents an essentially empirical, econometric question. But in fact until very recently there had been no systematic empirical study of the correlation, if any, between BITs and FDI flows. (Indeed, until recently there was little to no *data* on FDI flows to developing countries of sufficient quality and scope of coverage to permit justifiable regression analysis. Existing FDI data remains of very low quality for many developing countries and for many, if not most, years). The lack of empirical evidence even led the United States government to adopt the quasi-official policy of informing all prospective BIT partners that entering into a BIT with the United States was no guarantee that American investors would soon flock to the host state's shores. A number of empirical studies have appeared over the last several years, but a close review suggests that economists remain far from consensus on the proper methods or models to employ, or the proper conclusions to draw from the various results. Perhaps most importantly, the various studies reach contradictory, or at least inconsistent, results. In later Chapters I present my own econometric analysis of

the effects of BITs on FDI, but for the moment the important point is that given this objective uncertainty about the causal effect of BITs on FDI, we might reasonably expect the views of policy-makers to be more likely to be influenced in predictable ways by their own subjective worldviews. In other words, the lack of clear "objective" evidence of a causal relationship allows, or even forces, policymakers to fall back on other, more subjective criteria and beliefs to arrive at particular causal expectations. To the extent that the "BITs lead to FDI" logic itself represents a "Chicago School" faith in the positive responsiveness of private actors to the absence of government interference in (foreign investment) marketplace, we might expect partisans of the economic right to find the argument inherently much more persuasive, even in the absence of objective empirical evidence, than partisans of the left. In other words, it may be the case that partisans of the right are more likely to "think like economists", and therefore more likely to view the "BITs lead to FDI" logic as inherently plausible, if not likely.[44]

What about the second black-arrow relationship, the causal relationship between BITs and the development goals that they are supposed to promote? It is clear that development can have a host of different meanings, and can entail a host of cross-cutting objectives, ranging from social equity and social cohesion (favorite goals of the political left) to economic growth and efficiency (favorite goals of the political right). BITs and FDI are unlikely to help policymakers achieve all such development goals, and indeed, BITs and FDI may actually hinder the achievement of certain goals that require government intervention in the economy, such as environmental sustainability or social equity. There is some—though certainly not overwhelming—evidence that FDI might reasonably be expected to lead to economic growth.[45] And there is virtually no evidence that increased FDI helps governments achieve traditionally leftist developmental goals. Indeed, leftist political discourse frequently asserts that increased FDI is bad for development, a position that has recently (and surprisingly) received very qualified support from the IMF.[46] In short, partisan differences in the developmental goals that policy-makers can be expected to privilege, and differences in the quality and quantity of the evidence that increased FDI might

be useful (or harmful) in achieving those goals, suggests that different policy-makers are likely to hold markedly different assessments of the developmental value of using BITs to increase FDI.

Partisan ideas are also very likely to influence a policy-maker's estimation of the *costs* of entering into a BIT. (Costs are illustrated by the white arrows in the figure above). For example, leftist policy-makers, who can be expected to more highly value the ability to intervene in the domestic economy than rightist policy-makers, will be likely to view the sovereignty costs of BITs to be especially high. Rightist policy-makers, on the other hand, typically seek to restrain government interference in the economy, and may view the sovereignty costs of investment treaties to be not so much a cost of BITs, but actually a desirable side-benefit. The same goes for what I have labeled the "political costs" of increased foreign investment. As Sikkink has argued, "the expanded availability of international investment [can] be perceived as an opportunity or as a danger, depending on the ideas held by policymakers."[47] Leftist politicians (and their constituents) are much more likely to view increased foreign "penetration" of the domestic economy as a dangerous threat to national autonomy and identity than are partisans of the right. We can get a good sense of these fears of foreign investment by perusing leftist-oriented websites devoted to spreading alarmist "information" about free trade and investment agreements that, in the words of one prominent site, "are opening countries to the deepest forms of penetration by transnational corporations."[48] And historically speaking, we cannot forget the left's longstanding attachment to theories of *dependencia*, which emerged most directly out of work by Paul Prebisch, Hans Singer, and others in the 1950s, and which were widely publicized under the auspices of the Economic Commission for Latin America (ECLA).[49] Dependency theorists viewed with great suspicion the power that foreign corporations and their home governments were said to wield over developing countries and sought to render foreign investment subservient to the perceived development needs of the state, as part of what Blostrom and Hettne call "programmed industrialization."[50]

And finally, there is good reason to suspect that rightist politicians may be more likely to ascribe relatively higher values to the various "bribes" that capital-exporting countries may offer to developing countries to reward (or to coerce) them into signing and ratifying investment treaties. This is the case, for instance, if these bribes entail access to other neo-liberal economic institutions (such as the WTO). We can expect leftist politicians to view such access as at best a mixed blessing. For instance, leftist politicians are likely to view greater global economic integration as a threat to national economic sovereignty and to government-led development efforts. Politicians on the right, on the other hand, are likely to view such increased integration, including the loss of governmental capacity to manage and direct domestic markets, as developmentally desirable.

The chart below summarizes my argument so far. The basic point is that the ideas of politicians regarding the value of BITs, and of increased foreign investment, is likely to vary subjectively, and that this variance in subjective ideas is likely to be correlated with the politicians' partisan identities. In other words, politicians of different partisan stripes are likely to view the costs and benefits of BITs and of FDI in different (and predictable) ways. Politicians of the right are more likely to view the *benefits* of investment treaties to be high (indicated by " + ") and the *costs* to be low (" – "), and thus are more likely to view the treaties as, on net, advancing the "national interest" and worthy of signature and ratification. Politicians of the left are likely to have precisely the opposite estimations of costs and benefits, and precisely the opposite policy leanings.

Table 3.3: Policy Ideas of Partisan Decision-Makers

		Ideological Orientation	
Benefits of Investment Treaties		**Right**	**Left**
	BITs Promote FDI	**+**	–
	FDI Promotes Development	+	–
	Bribes Are Valued	+	–
Costs of Investment Treaties	**Sovereignty Costs Are High**	–	+
	Political Costs Are High	–	+
"+" indicates more likely to believe; "–" indicates less likely to believe			

The theory as discussed so far implicitly assumes that what it means to be economically "leftist" or "rightist" is stable across time. But what if "leftist" ideas about the costs and benefits of BITs and FDI change temporarly in predictable (e.g. non-random) ways? For example, it is frequently suggested in the ideational literature that new ideas are particularly influential when "dramatic policy failures or crises" illustrate the bankruptcy of status quo world views.[51] In this vein, the collapse of Communism vividly illustrated the failings of Marxist and neo-Marxist ideology as a viable economic strategy. As Juliet Johnson has argued,

> the nearly simultaneous collapse of…Communist polities undermined…fundamental bases on which these states had made policy choices…it exploded the perceived right of the state to direct the economy, control property, and employ most citizens engaged in commercial transactions….The breakdown of Communist rule can therefore be seen as a critical juncture that opened a window of expanded policy choice.[52]

Communism's collapse was meaningful even outside of Eastern Europe and the former Soviet Union, as Marxist thinking explicitly influenced the various flavors of "dependency theory" that non-Communist members of the developing world used to justify stringent government control over foreign investment.[53] Conventional wisdom suggests that neo-liberal economic ideas quickly rushed in to fill the ideological void.[54] For instance, Oyzranzowski and Paleczny-Zapp attribute Poland's ready adoption of so-called "shock therapy" to the inability of Polish economists, trained exclusively in now-defunct Marxist

methods, to offer "any meaningful alternatives" to the heavily free-market suggestions of American advisers such as economist Jeffrey Sachs.[55] The general perception that "middle-ground" or "heterdox" economic policies, adopted briefly by such countries as Argentina and Brazil in the 1980s, had also failed to promote economic growth provided further support in favor of the neo-liberal model that would become known as the "Washington Consensus" and which emphasized open-door policies to foreign investment.[56]

Such arguments suggest that in the face of strong "lessons learned" that discredit particular partisan economic ideas, partisanship might be expected to decline in importance as a predictor of the orientation of economic policy generally, and as a predictor of FDI policy in particular. In other words, in the wake of the end of the Cold War and the emergence of the "Washington Consensus," leftist policymakers might be expected to behave much more like rightist policymakers because of the newfound persuasiveness of the rightist economic worldview. Note that the hypothesized relationship between the collapse of Communism (as a signal of the failure of leftist economic policies generally) and government partisanship as predictors of FDI policy is conditional. Left government is predicted to *negatively* affect BIT signings and ratifications prior to the collapse of Communism, but to insignificantly affect BIT signings and ratifications after the collapse.

§ 3.3: A Note on Policy Diffusion

The present study must be properly situated in the recently revived literature on international policy "diffusion." Diffusion theory is especially well-developed in the domestic politics literature, which for many years has sought to explain the adoption and maintenance of various laws and policies by states in the American federal system. Gray's 1973 contribution is especially seminal in this regard.[57] The essential insight of the diffusion literature is that the adoption of a new policy in one political unit may influence the likelihood that another political unit will also adopt the policy. It is in this sense that

policies are said to diffuse "spatially" across countries as the unit of analysis. Diffusion theory is thus largely a sophisticated gloss on Sir Francis Galton's famous "problem" of lack of independence between cross-national units. The problem is so potentially injurious to our ability to make valid causal inferences in pooled samples that its recognition reportedly stifled cross-national comparative research in anthropology for half a century.[58]

Diffusion theory has been only fitfully applied to the field of international relations. Within international relations, it has been invoked almost exclusively to explain state decisions to wage war. But by 1998 scholarly interest in the "diffusion of war" research program was "waning" due in part to the program's failure to produce measurable and cumulative gains in our understanding of the causes of war.[59] This waning interest in diffusion explanations of international security policy choices makes the current explosion of interest in diffusion explanations of international political economy all the more remarkable. In a recent special symposium issue of the journal *International Organization*, four separate articles apply diffusion theory to explain a wide array of international economic policy choices, ranging from tax policy to "public-sector downsizing", all grouped under the generic label of the "diffusion of liberalism." The collection includes an important contribution by Elkins, Guzman, and Simmons (EGS) that presents a sophisticated diffusion analysis of state decisions to sign BITs.[60]

Government partisanship, the main explanatory variable in the present study, is not a diffusion variable precisely because it taps characteristics internal to the unit of analysis that are presumed to be independent of the characteristics of other units. To explain Unit A's behavior, we are concerned with Unit A's partisanship and not with Unit B's. Furthermore, there is no suggestion of what might be called "indirect diffusion" in the sense that Unit B is somehow "causing" Unit A's partisanship, which in turn "causes" Unit A's adoption of BITs. But this does not mean that diffusion-type mechanisms may not also play a causal role in influencing state decisions to sign and ratify BITs, and the analysis below makes

a number of attempts to control for the possibility that those decisions are indeed influenced by the examples of other states.

For example, in an introductory article to the symposium issue that informs EGS's own contribution, Simmons, Dobbin and Garrett suggest four mechanisms through which international policy diffusion might take place.[61] States might be "coerced" into adopting particular policies, either by a powerful state in the world system, or by powerful international institutions, such as the IMF or World Bank. States might also face "competitive" economic pressures to adopt policies. Policy adoption might be driven by policy "learning", whereby the policy choices and experiences of other states in the international system provide new data on the costs and benefits of particular actions. And finally, states may adopt policies in "emulation" of the shared ideas of the "world polity" or of "epistemic communities."

This is not the place to critique this particular slicing of the diffusion pie, though it is helpful to point out that the models tested below include controls of one sort or another for three of the four suggested diffusion mechanisms. I do not separately and explicitly control for the possibility of policy "emulation", in large part because the concept is under-developed in the Simmons et al. schema and is difficult to distinguish in theory or in practice from other diffusion mechanisms. For example, is a developing country that adopts a BIT in response to its neighbor's own adoption of BITs doing so because of competitive pressures, or out of some sort of non-competitive "emulation" based on a shared idea that BITs are the "right thing to do"? It is telling in this regard that Elkins et al. do not separately control for the possibility of "emulation" in their own empirical models. I follow their example here.

§ 3.4: Empirical Analysis

The present Section presents results from a statistical analysis of the arguments made above. The basic hypothesis is that, *ceteris paribus*, states headed by partisans of the economic left will be less likely to sign and ratify BITs than states headed by partisans of the economic right.

§ 3.41: The Model

I test the hypothesis using an unbalanced panel research design, in which models are estimated across country-units and across time. The main dataset comprises country-level annual observations, covering the years 1975 to 2000. I am unable to extend the analysis beyond 2000 because the main explanatory variable, government partisanship, is not collected beyond that date. As a sensitivity test, I also present results from an analysis in which I convert the annual data to five-year period averages.

The models using the annual dataset generally comprise more than 2000 observations, and cover up to approximately 140 (capital-importing) countries. The unit of analysis is the country-year. This is a key methodological difference from the EGS study. In the EGS models the unit of analysis is the dyad-year. This choice reflects the fact that EGS are attempting to explain why particular developing countries sign (or don't sign) BITs with particular capital-exporting countries. Their data set is accordingly arranged by pairs of capital-importing and capital-exporting dyad partners, as is appropriate if one wishes to predict whether Nigeria is more likely to sign a BIT with the United Kingdom than with the United States. My own analysis addresses the analytically distinct question of why particular developing countries sign (and ratify) BITs with capital-exporting countries considered as a group.

My research design is "unbalanced" in the sense that certain developing countries are observed for more time periods than are others. This is because of imperfect data availability as well as the entry

of new developing countries into the world system following the collapse of the Soviet Union. Depending on the form of the dependent variable, I estimate the models using either negative binomial or logit techniques. (In contrast, EGS estimate their models using duration analysis techniques). In all reported cases likelihood-ratio tests indicate that panel estimation, rather than simple pooled estimation, is appropriate.

§ 3.42: Dependent Variables

In all of the models presented below we are, in essence, trying to predict whether or not a given developing country will agree to "enter into" a BIT of one kind or another in a particular year. The quotes around "enter into" are meant to indicate an important ambiguity: most countries divide their treaty-related decision-making process into two stages. In the first, the country's chief executive *signs* the treaty, indicating his intent to see the treaty eventually *enter into force*. But the chief executive's signature, by itself, is not usually sufficient to guarantee entry into force: the domestic laws of most countries impose the additional requirement of *ratification*, which is usually the purview of the national legislature. Until a treaty has been ratified by the legislatures of both countries that have signed the treaty, the treaty will generally have no legal effect, because it has not yet entered into force. This means that the analyst has two choices of dates indicating when a developing country has "entered into" a treaty: either the date of signing, which is more properly viewed as the date upon which *one branch* of the government has indicated an intent that the state be legally bound, and the date of ratification, upon which *all relevant branches* of the government have indicated their assent in a binding way.

Unfortunately, it is extremely difficult, if not impossible, to collect data on the date of developing-country ratification of a particular treaty, as opposed to the date upon which the particular treaty enters into force. (Bilateral treaties generally do not enter into force until they have been ratified by both of the treaty signatories, where the signatories' internal laws require ratification). The impossibility

of identifying dates of ratification for a sufficiently large sample of treaties means that I have to rely on the year of treaty *entry into force* as a proxy for the year in which the developing country treaty partner in fact ratified the treaty. In some cases a treaty's entry into force may be delayed by the capital-exporting partner, though in truth it is difficult to understand why a capital-exporting state would have much if any incentive to delay ratification of a treaty that stands primarily to benefit its own investors. An in those cases where country-specific ratification dates are available, it appears from my admittedly non-systematic examination that treaties are typically ratified by host states in the same year in which the treaties enter into force. This suggests that relying on dates (e.g. the year) of entry into force is a reasonable if imperfect proxy for the date of developing country ratification. In any event, I report results using both dates of signing and dates of ratification to construct the dependent variables.

Putting aside the question of relying on dates of signing or entry into force, it is important to note that the basic dependent variable—whether a country entered into a treaty—can be constructed as either a count of new treaties ("how many BITs did the developing country enter into last year?") or as a dichotomous variable ("did the developing country enter into any BITs last year?").

I present results for both constructions, with the results for the count models presented first. Here the dependent variable is the *total number of BITs* that a given host state signs or ratifies in a given year with any of the top 18 capital-exporting countries. The dependent variable takes the form of non-negative count data: in a given year, a given country might sign or ratify 0, 1, 2, 3, 4, and so on number of BITs. Poisson maximum-likelihood regression is appropriate for this form of data, although where the variance of the dependent variable is greater than it would be if generated by a true Poisson process (e.g. where the dependent variable is over-dispersed), negative binomial maximum likelihood regression, a special case of Poisson regression, is preferred. This is because, in the face of significant overdispersion, Poisson estimation produces downward-biased standard errors and, thus, inflated z-scores.[62] Negative binomial regression addresses the problem of overdispersion by parameterizing the degree of dispersion

(generally denoted α). The Poisson model assumes that α is equal to zero; the negative binomial model allows α to take on non-zero values.

There is substantial evidence of overdispersion in the raw count data. For example, in Model I, Table 3.8, presented further below, I predict the number of new strong BITs that enter into force for a given developing country in a given year. Summary statistics of the dependent variable for that model show that the standard deviation exceeds the sample mean by, approximately, a factor of 3:

Table 3.4: Overdispersion of the BIT Variable

Variable	*Obs.*	*Mean*	*Std. Dev.*	*Min*	*Max*
New Strong BITs, EIF	3120	0.165	0.548	0	5
Note: Summary Statistics are from the sample estimated in Model I, Table 3.8, presented and discussed in the next Section.					

The other versions of the dependent variable presented in Table 3.8 have similar means and standard deviations, again suggesting overdispersion. Likelihood-ratio (LR) tests on the estimated models provide further evidence. For all of the models presented in Table 3.8, LR tests suggest that the α parameterization of the degree of dispersion is significantly greater than zero at the ≤ 0.001 level. Because the Poisson distribution is characterized by an α of zero, the results of the LR test council strongly in favor of negative binomial rather than Poisson estimation. (In fact, model results using Poisson regression, in either its random- or fixed-effects form, are "better" in the sense that key independent variables are more consistently statistically significant than they are in the negative binomial results presented below. I do not report the Poisson results, however, precisely because of the likelihood that the results are biased).

I report results for both random effects and conditional fixed effects negative binomial models. The "effects" concern the way in which the value of the α (overdispersion) parameter is modeled. In

both cases α is held constant within country groups. In the random effects case, α is assigned to country-groups randomly such that the overall distribution satisfies a particular distribution. In the conditional fixed effects case, α is allowed to take any value, without constraint to an overall distribution. We have no *a priori* reason to prefer either modeling approach, though it is worth noting that the conditional fixed estimator forces countries with all-zero outcomes across the time-period of study to drop from the sample. This means that the random effects and conditional fixed effects models cover somewhat different samples and, for that reason, are not fully comparable. (Stata also permits the computation of population-averaged (PA) negative binomial models. I do not report PA results here because the PA estimator fails to converge in several of the model specifications).

Second, I present results for models in which the dependent variable takes on a value of "0" if a given host state signs or ratifies no BITs in a given time period, and a value of "1" if it signs or ratifies one or more BITs in a given time period. In other words, the dependent variable here is *whether or not a host state signs or ratifies any BITs.* Here that the dependent variable is dichotomous, which means that logit or probit maximum-likelihood regression techniques are appropriate. Because logit is used more frequently in the empirical political science literature, and because logit coefficients tend to be more easily interpretable than probit coefficients, I present logit results in the main figures below. Note also that dichotomizing the dependent variable throws out a certain amount of information. For instance, in the logit analysis the developing country that signs four new BITs in a given year is analytically indistinguishable from the developing country that signs only one new BIT. The loss of information, however, appears to be substantively slight, because there are relatively few observations in which the number of new BITs signed or ratified is higher than "1". For example, tabulating the dependent variable used in Model I, Table 3.8 (the number of new strong BITs entering into force), we see that less than four percent of the sample observations contain a count higher than "1":

Table 3.5: Summary Statistics: New Strong BITs Entering Into Force

Count	*Frequency*	*Percent*	*Cumulative Percent*
0	2777	89.01	89.01
1	233	7.47	96.47
2	64	2.05	98.53
3	33	1.06	99.58
4	10	0.32	99.90
5	5	0.10	100.00
Note: Summary Statistics are from the sample estimated in Model I, Table 3.8, presented and discussed in the next Section.			

The other versions of the dependent variable show similar distributive characteristics, suggesting, again, that the information loss entailed in moving from negative binomial to logit regression is not particularly severe. As with the negative binomial models, I present logit results using both random and fixed effects estimators.

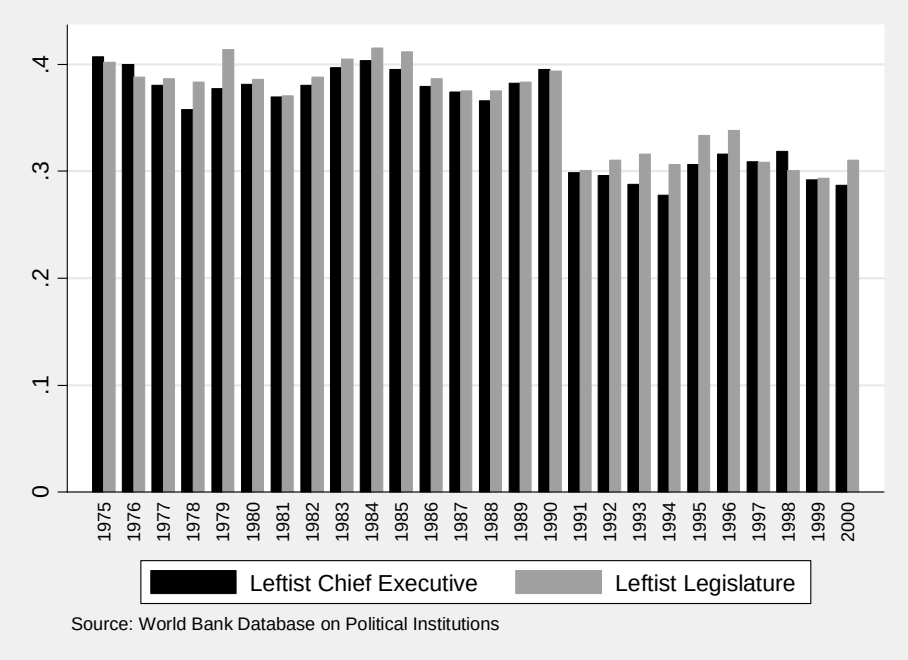
§ 3.43: Independent Variables

Government Partisanship. The independent variable of main theoretical interest taps the partisan ideology of the host state's government leaders. I use data on government partisanship derived from the World Bank's Database on Political Institutions (DPI) to construct dummy variables indicating whether the executive is controlled by a member of a economically leftist party and whether the legislature is controlled by members of an economically leftist party.[63] The DPI uses primary and secondary sources to classify political parties along a left-center-right continuum on the basis of economic policy orientation. Parties on the right prefer less government control over the economy; parties on the left prefer the opposite. The DPI identifies the partisan affiliation of the holder of executive power (e.g. the president or prime minister) and the affiliations of the major majority and minority parties in national legislatures. Where the DPI indicates that the executive is controlled by the left, the executive dummy variable is coded as "1"; where the DPI indicates that the executive is coded by a "center", "right", or "other" type of party, I code the executive dummy variable as "0". Likewise, where the DPI codes the largest party in the parliamentary majority as being on the left, my legislative

dummy variable takes the value of "1". Where the DPI codes the largest majority party as being on the "center" or "right", or being "other", my legislative dummy variable takes on the value of "0."

The following Figure shows the annual proportion of leftist-controlled governments in the sample on an annual basis. We can see that in the typical year approximately 1/3 of the sampled countries were governed either by a leftist chief executive or a leftist-controlled parliament, and that there is an overall decline in the proportion of countries governed by the left in the years following 1990, as a number of formerly Communist countries embraced democracy (and rightist political candidates), and as right-governed former republics of the Soviet Union entered the sample.

Figure 3.2: Proportion of Developing Countries Governed by Leftist Chief Executives or Legislatures



In the analysis below I estimate separate models using, alternately, the executive-branch and legislative-branch partisanship variables. This is because the two variables are very highly correlated (with a correlation coefficient of over 0.88), leading to problems of multicollinearity when both measures are

included in a single model. But to the extent that chief executives primarily control treaty signings, and legislatures primarily control treaty ratifications, we would expect the partisan chief executive variable to be most consistently correlated with dates of signing, and the partisan legislature variable to be most consistently correlated with dates of entry into force.

The Collapse of Communism. The discussion in Section 3.2 suggested that partisan differences in FDI policy might be expected to decline in the face of strong "lessons learned" about the relative costs and benefits of different courses of policy action. The collapse of Communism is widely held to represent the kind of dramatic evidence of policy failure that is needed to spur changes in long-held patterns of beliefs and behavior.

I control for this possibility by including a dummy variable modeling the period before and after the collapse of the Berlin Wall in the final half of 1989. For years prior to 1990, the dummy variable is coded as "0". For years after 1989, the dummy variable is coded as "1". Note however that the hypothesized relationship between partisanship and the end of the Cold War is a conditional one. Partisanship is predicted to matter prior to 1990, and to not matter, or to matter less, in the years after 1989. I model this conditionality in the standard way: by including in the models a multiplicative interaction term between the government partisanship variable and the Berlin Wall dummy variable.

Number of Existing BITs. I also include two control variables for the number of BITs already in force in the given host state. The first variable is a simple count of the number of strong BITs already in force, and the second variable is a count of the number of non-strong BITs already in force. These two variables controls for the fact that as the host state has more and more BITs in force with the world's capital-exporting countries, there are less potential new capital-exporting partners with whom to sign additional treaties. All else being equal, we would expect a particular host state to be less likely to sign or ratify a new BIT as the number of potential new partners decreases.

Developing Country Competition. One of the more consistent themes in the BIT literature is that developing countries are in a "competition" for FDI. The basic idea is intuitively plausible. Foreign investors are footloose, and have the luxury of sinking their investments in one of a number of "competing" developing countries. Developing countries recognize this possibility, and adopt their FDI policies in response to the policies of their competitors in order to remain "competitive" in the contest to attract the investments. EGS argue in particular that competitive dynamics are in large part responsible for the popularity of BITs. But EGS fail to map out the competitive logic of their theory in any detail. This failure leads them to make a critical analytic error. For example, EGS argue that competitive pressures to adopt BITs will increase linearly as more and more competing developing countries sign the treaties. Where more of a particular developing state's competitors have already signed BITs, the remaining holdout, they argue, will be significantly more likely to give in than it was when none of its competitors had yet taken the plunge. And indeed, they report very strong empirical confirmation of their theoretical expectations: "When more of a host state's competitors have signed BITs, that country is much more likely to do so itself."[64] The problem is that their theoretical expectations are the exact opposite of what competitive theory, properly understood, should lead us to expect.

Take the following simple illustration of the competitive dynamics that might drive BIT adoptions. Imagine four developing countries, A, B, C, and D, which are competing for a given FDI project. Imagine that the foreign investor compares the four countries along five dimensions (quality of infrastructure, policy stability, and the like) and finds that the countries are evenly matched. On the investor's checklist, each country rates a five out of five. In this situation, the investor's decision will essentially be determined by chance, and each country stands a 25 percent probability of winning the project. This is the situation represented in Column I of Table 3.6, below. Boldfaced entries indicate that the particular State has a chance of winning the FDI project.

Table 3.6: The Competitive Dynamics of BITs (Investor-Friendly Index / Percent Chance of Winning Investment Project)

	I	II	III	IV
State A	**5 / 25%**	**6 / 100%**	**6 / 33%**	**6 / 25%**
State B	**5 / 25%**	5 / 0%	**6 / 33%**	**6 / 25%**
State C	**5 / 25%**	5 / 0%	**6 / 33%**	**6 / 25%**
State D	**5 / 25%**	5 / 0%	5 / 0%	**6 / 25%**

Now imagine that it becomes feasible to sign and ratify a BIT, and that doing so would raise a country's investment rating by one. State A concludes a BIT, and its score increases to 6. State A is now a noticeably more attractive place to invest than its competitors. State A will win the project with 100 percent certainty, as indicated in Column II. Now notice what happens in Column III. Here, States B and C have followed A's lead and also entered into BITs, raising their own probability of winning the project from zero percent to 33 percent, but *lowering* A's probability of success from 100 percent to 33 percent as well. When State D finally follows suit, the developing countries are back in the same (relative) positions they were in before the BITs were feasible. Each stands an equal, 25 percent chance of winning the project.

This simple model suggests that the effects of BITs on the distribution of FDI inflows will be the greatest when BITs are few and far between. When State A is the only state bound by a BIT, it will always win competitive FDI projects given equality on all other factors that matter to investors. On the other hand, when all states are bound by BITs, the treaties have no effect on who wins a particular project. This in turn suggests that developing countries will face the greatest "competitive pressures" to sign and ratify a BIT when few or none if its "competitors" have done so. This is when the expected benefit of the BIT is the greatest. And because, as we have seen, BITs necessarily entail *costs* as well as benefits, we might expect an equilibrium of sorts to be reached well before all competing states have adopted the treaties. For example, in Column III in the Table above, imagine that the costs of entering into a BIT exceed the expected benefit of a 25 percent chance of winning competitive FDI projects. In that case, State D is better off *declining* to join the BIT party.

In the empirical analyses presented below I proxy the state of the FDI "competition" by controlling for the number of BITs in force in each host state's geographic region. This count of regional BITs is adjusted by subtracting the particular host state's own BITs from the regional count.[65] I standardize the measure by dividing the adjusted regional count by the number of capital-importing countries in each region. I expect this measure of regional competition to be negatively correlated with the probability that a given host state will sign or ratify its own BITs. As the number of regional BIT's increases, competitive incentives for holdouts to adopt BITs should decrease.

EGS use a more complicated methodology to identify "competitors". They draw on work in network analysis to calculate "spatial lags" that measure the "competitive distance" between units, based on inter-unit correlations across certain variables assume to be relevant to investor decision-making. Units that are "closer" are assumed to be "competitors" for FDI projects. EGS calculate three different spatial lag variables. The first measures the similarity of export markets, the second the similarity of goods exported, and the third measures similarity among a basket of "cultural" variables.

My position is that focusing on regions as the epicenter of FDI competition is to be preferred, both on pragmatic and on substantive grounds. Pragmatically, identifying regions is computationally far simpler for the analyst, as it requires significantly less information and mathematical manipulation. Using regions as a proxy means of identifying "competitors" thus promotes more parsimonious model-building. Substantively, note that the real task at hand is to identify as competitors the same countries that developing leaders themselves view as competitors. By "competition" we mean that State A monitors the policy choices of State B and views itself as materially affected by those policy choices. Presumably national leaders use some sort of heuristic process to identify states worthy of monitoring, and certainly some states will be easier to monitor than others. The real question, then, is whether calculating various "spatial lags", and especially calculating spatial lags based on the sophisticated analysis of bilateral trade

flows, accurately approximates the actual heuristic used by leaders to decide which countries' FDI policies to carefully monitor. It is certain that national leaders in the developing world do not *actually* identify competitors on the basis of spatial lag calculations. Indeed, until quite recently calculating spatial lags would have been impossible given the lack of reliable cross-national bilateral trade data for most of the developing world. National leaders simply haven't had the statistical capacity to determine the similarity of export patterns to those of other developing countries, even if they might have found the exercise worthwhile.

What national leaders are likely to do is precisely to adopt a regional bias in their monitoring efforts for both subjective and objective reasons. Subjectively, monitoring the policies of regional members is likely to be easier than monitoring the policies of states outside of the region due to geographic distance and, perhaps, cultural factors that are regionally based, such as the sharing of a common language. Regionalism is also highly institutionalized through free trade areas, regional working groups, and other regionally based institutions, providing regional members with ample opportunities to remain up-to-date on the policy initiatives of other members. Indeed, much of the work of the United Nations is region-based and region-organized, and it is very likely that this tendency to formalize international institutions along regional lines in the U.N. both reflects and influences the tendency of state leaders to look first and foremost and what their geographic neighbors are doing, whether in the realm of FDI policy or elsewhere. It is notable in this regard that in his comparative study of domestic FDI regimes, based on interviews with FDI officials and international businessmen, the only "overt" evidence of competition that Robinson found was regionally-based (between Malaysia and the Philippines).[66]

Objectively, there appears to be quite good reason for developing countries to view their regional counterparts as likely competitors for FDI projects. For example, there is fairly robust evidence that FDI tends to cluster on a regional basis, and that multinational corporations tend to arrange their operations

on a regional basis, all of which suggests that when deciding where to site a project foreign investors tend to compare and contrast regionally proximate investment opportunities.[67] In contrast, there appears to be little to no evidence in support of the EGS contention that FDI tends to mimic or to follow developing country export patterns. EGS assert conclusorily that "trade competitors are also likely to be competitors for FDI and empirical studies show that the two are strongly correlated,"[68] but they provide no citations to any such study.

In sum, in the absence of stronger evidence that spatial lag constructions accurately reflect either the subjective perceptions of national leaders or the objective tendencies of foreign investors, the better route is to approximate competition through regional variables.

Institutional Coercion. I include a dummy variable indicating whether or not the particular host state has received a loan from the International Monetary Fund (IMF) or World Bank in the period of the treaty signing or its entry into force. It is reasonable to suspect that international financial institutions might pressure or bribe developing countries to adopt investment treaties. The International Monetary Fund (IMF) and the World Bank are the two most important such institutions, and either of them might view BITs as desirable either in a narrow, technocratic sense (as helpful in promoting economic development by securing property rights, and in promoting or stabilizing international capital flows) or in a more nuanced political sense (as a means of providing important economic benefits for the corporations of the institutions' most important members).

Past FDI Performance. Finally, I include a measure of each host state's past performance at attracting FDI. If host states sign BITs primarily in an attempt to attract greater levels of foreign investment, then we would expect host states with poorer records of attracting investment to be more willing enter into the treaties than host states with highly successful records. Host states that are already

successful at attracting large amounts of foreign investment have little need to incur the sovereignty and political costs associated with BITs.

I measure past investment performance as FDI inflows as a percent of host state GDP, a measure which we can usefully view as tapping the extent to which FDI is "penetrating" the host economy.[69] FDI penetration has been used as a measure of foreign investment success in previous studies of the determinants of FDI inflows. Including past FDI performance allows us to avoid having to include separate control variables for the overall attractiveness of the given host state as a destination for foreign investment. For example, it is reasonably argued that host states suffering from high levels of political risk will be most likely to turn to BITs in order to compensate for their risky investment climates. Where the investment climate is already favorable, host states gain little by tying themselves to international law. In our case, however, differences in overall investment climate should be already reflected in our measure of past foreign investment success—high-risk host states should have lower FDI penetration ratios; low-risk states should have higher rates of FDI penetration.

§ 3.5: Model Results & Discussion

Tables 3.8 and 3.9 present results for the negative binomial models. Table 3.8 uses a random-effects estimator, while Table 3.9 uses a fixed-effects estimator. I test the robustness of the general model across five separate specifications of the dependent variable. Model I predicts the number of new strong BITs entering into force in a given year. Strong BITs are those that contain comprehensive, effective state pre-consents to investor-initiated international arbitration, as described in the previous chapter. The effects of partisanship should be most noticeable for these kinds of BITs, because pre-consents provide the principle reason why the treaties might be viewed as incompatible with the achievement of traditional leftist policy goals. Model II predicts strong BIT *signings*. Because of the difficulty of locating copies of signed but unratified BITs (which is necessary in order to classify the

treaties' dispute-settlement provisions), Model II counts only those signed strong BITs that eventually enter into force. Model III predicts the entry into force of all BITs, including strong and not-strong treaties. Models IV and V predict the number of new signed BITs of all types (again, strong and not-strong), but Model IV includes only those BITs that eventually enter into force, while Model V includes all BIT signings, whether or not the signed treaties ever enter into force. All models also contain year dummy variables, the results of which are not reported.[70] Including country dummies leads to serious computational difficulties, with most models failing to converge when they are included. For that reason none of the models contain country dummies.

Table 3.7, immediately below, presents summary statistics for the independent variables used in the empirical analysis.

Table 3.7: Summary Statistics, Basic Negative Binomial Model

Independent Variable	*Obs*	*Mean*	*Std. Dev.*	*Min*	*Max*
# Own Strong BITs Already in Force	3212	0.94	2.20	0	16
# Own Non-Strong BITs Already in Force	3212	1.25	2.04	0	16
# BITs in Force in Region	3212	2.47	2.47	0	12.13
FDI Performance (FDI Inflows, % GDP)	3212	1.48	5.08	-83.02	145.17
IMF or IBRD Loan Dummy	3212	0.57	0.50	0	1
Berlin Wall Dummy	3212	0.45	0.50	0	1
Left Executive	3212	0.35	0.48	0	1
Berlin Wall*Left Executive	3212	0.14	0.35	0	1
Note: Summary statistics are from the sample estimated in Table 3.8, Model I, below.					

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Turn now to the presentation of the negative binomial model results, presented below in Tables 3.8 and 3.9. For ease of exposition, Table 3.8 and 3.9 reports incident rate ratios (IRRs) rather than regression coefficients. The "rate" reflected an in IRR is the predicted number of events (either BIT signings or BIT entries into force) per time period.[71] IRRs are calculated by exponentiating the negative binomial coefficients of the fitted model. The IRR represents the estimated rate ratio for the dependent

variable when the relevant independent variable changes by one unit, holding the other variables in the model constant. For example, an IRR for the partisan government variable of 0.900 would indicate that as partisan control of government changed by one unit (from "0" for control by the right to "1" for control by the left), the expected number of treaty signings (or ratifications) declines by 10 percent. On the other hand, an IRR of 1.100 would indicate an effect of the opposite direction: a move from right to left control of government is associated with a 10 percent *increase* in the rate ratio. In this latter example, we would expect leftist governments to sign (or ratify) 10 percent *more* treaties than their rightist counterparts. IRRs of less than 1 thus indicate a "negative" average effect on the dependent (count) variable; an IRR of greater than 1 indicates a "positive" effect.

Table 3.8: Partisanship and the Willingness to Sign and Ratify Strong BITs—Random Effects Negative Binomial Regression

	I. New Strong BITs In Force		II. New Strong BITs Signed		III. All New BITs In Force		IV. All New BITs Signed (Only if EIF)		V. All New BITs Signed	
# Own Strong BITs Already in Force, t-1	0.941 (2.00)*	0.935 (2.24)*	0.821 (6.22)**	0.827 (6.18)**	0.960 (1.60)	0.960 (1.60)	0.870 (4.89)**	0.867 (5.03)**	0.863 (5.51)**	0.860 (5.66)**
# Own Non-Strong BITs Already in Force, t-1	0.954 (1.19)	0.983 (0.44)	0.964 (0.92)	0.965 (0.92)	0.908 (3.35)**	0.919 (3.07)**	0.843 (5.49)**	0.846 (5.62)**	0.840 (5.86)**	0.845 (5.91)**
# BITs in Force in Region, t-1	0.992 (0.19)	1.005 (0.11)	0.949 (1.14)	0.965 (0.77)	0.979 (0.55)	0.984 (0.42)	0.921 (1.81)[a]	0.930 (1.60)	0.923 (1.98)*	0.931 (1.75)[a]
FDI Performance (FDI Inflows, % GDP), t-1	0.987 (1.11)	0.987 (1.17)	0.995 (0.45)	0.993 (0.59)	0.989 (1.00)	0.988 (1.07)	0.992 (0.63)	0.990 (0.79)	0.993 (0.64)	0.992 (0.78)
IMF or IBRD Loan Dummy	1.182 (0.98)	1.233 (1.23)	1.169 (0.99)	1.192 (1.12)	1.635 (3.23)**	1.753 (3.72)**	1.486 (2.67)**	1.570 (3.08)**	1.497 (2.85)**	1.581 (3.27)**
Berlin Wall Dummy	16.362 (3.58)**	4.567 (1.99)*	32.605 (3.40)**	31.322 (3.19)**	4.748 (3.31)**	3.091 (2.15)*	4.118 (2.66)**	3.851 (2.52)*	14.304 (4.32)**	5.833 (3.14)**
Left Executive	**0.289 (3.20)****	-	**0.375 (3.27)****	-	0.698 (1.50)	-	**0.613 (2.15)***	-	0.675 (1.83)[a]	-
Berlin Wall*Left Executive	**3.169 (2.88)****	-	**2.581 (3.11)****	-	1.421 (1.36)	-	**1.736 (2.32)***	-	**1.725 (2.39)***	-
Left Legislature	-	**0.374 (2.70)****	-	**0.379 (3.32)****	-	0.767 (1.13)	-	**0.620 (2.12)***	-	0.672 (1.85)[a]
Berlin Wall*Left Legislature	-	**2.513 (2.46)***	-	**2.702 (3.36)****	-	1.328 (1.13)	-	**1.869 (2.70)****	-	**1.776 (2.58)****
Year Dummy Variables	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Observations	3212	3120	3211	3119	3209	3117	3120	3118	3212	3120
Countries	146	144	146	144	146	144	146	144	146	144
Period	1975-2000	1975-2000	1975-2000	1975-2000	1975-2000	1975-2000	1975-2000	1975-2000	1975-2000	1975-2000
X^2	195.05**	195.88**	237.23**	238.33**	188.83**	186.73**	203.90**	213.88**	221.90**	231.29**

Notes: Estimated using negative binomial regression (using the -xtnbreg- routine in Stata), with random country-specific dispersion levels. Incident rate ratios (exponentiated coefficients) are reported, along with absolute-value z-scores in parentheses. * and ** indicate (two-tailed) significance at the ≤ 0.05 and 0.01 levels respectively; [a] indicates significance at the ≤ 0.10 level.

Table 3.9: Partisanship and the Willingness to Sign and Ratify Strong BITs—Fixed Effects Negative Binomial Regression

	I. New Strong BITs In Force		II. New Strong BITs Signed		III. All New BITs In Force		IV. All New BITs Signed (Only if EIF)		V. All New BITs Signed	
# Own Strong BITs Already in Force, t-1	0.800 (7.29)**	0.796 (7.59)**	0.710 (10.52)**	0.720 (10.32)**	0.854 (6.04)**	0.856 (6.02)**	0.775 (8.63)**	0.773 (8.91)**	0.766 (9.49)**	0.764 (9.81)**
# Own Non-Strong BITs Already in Force, t-1	0.837 (2.87)**	0.871 (2.31)*	0.872 (2.62)**	0.860 (2.93)**	0.788 (6.27)**	0.806 (6.16)**	0.732 (7.98)**	0.736 (8.51)**	0.728 (8.11)**	0.734 (8.63)**
# BITs in Force in Region, t-1	0.920 (1.15)	0.937 (0.90)	0.823 (2.98)**	0.851 (2.48)*	0.876 (2.24)*	0.881 (2.17)*	0.788 (3.96)**	0.803 (3.73)**	0.801 (4.13)**	0.812 (3.91)**
FDI Performance (FDI Inflows, % GDP), t-1	0.988 (0.89)	0.986 (1.00)	1.001 (0.09)	0.999 (0.07)	0.991 (0.64)	0.990 (0.73)	1.000 (0.01)	0.997 (0.20)	0.999 (0.10)	0.997 (0.26)
IMF or IBRD Loan Dummy	0.900 (0.57)	0.970 (0.17)	1.052 (0.31)	1.068 (0.40)	1.463 (2.26)*	1.637 (2.93)**	1.389 (2.12)*	1.503 (2.70)**	1.409 (2.28)*	1.523 (2.86)**
Berlin Wall Dummy	5.113 (2.51)*	5.933 (2.35)*	56.206 (3.92)**	44.126 (3.67)**	38.062 (6.04)**	34.081 (5.81)**	20.253 (5.50)**	19.761 (5.50)**	20.099 (5.38)**	4.014 (3.43)**
Left Executive	**0.180 (4.01)****	**-**	**0.267 (4.07)****	**-**	**0.353 (3.51)****	-	**0.325 (4.24)****	**-**	**0.378 (3.86)****	**-**
Berlin Wall*Left Executive	**3.907 (3.20)****	**-**	**2.808 (3.26)****	**-**	**2.363 (2.84)****	-	**2.575 (3.62)****	**-**	**2.492 (3.64)****	**-**
Left Legislature	**-**	**0.253 (3.45)****	**-**	**0.274 (4.13)****	-	**0.415 (3.05)****	**-**	**0.339 (4.18)****	**-**	**0.375 (3.92)****
Berlin Wall*Left Legislature	**-**	**2.974 (2.75)****	**-**	**3.045 (3.62)****	-	**2.064 (2.49)***	**-**	**2.780 (4.03)****	**-**	**2.574 (3.87)****
Year Dummy Variables	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Observations	2321	2271	2448	2395	2433	2383	2538	2485	2696	2617
Countries	106	104	111	109	111	109	115	113	122	119
Period	1975-2000	1975-2000	1975-2000	1975-2000	1975-2000	1975-2000	1975-2000	1975-2000	1975-2000	1975-2000
X^2	219.24	221.15**	302.72**	292.34**	201.57**	201.42**	268.62	282.30**	288.77**	305.13

Notes: Estimated using negative binomial regression (using the -xtnbreg- routine in Stata), with fixed country-specific dispersion levels. Incident rate ratios (exponentiated coefficients) are reported, along with absolute-value z-scores in parentheses. * and ** indicate (two-tailed) significance at the ≤ 0.05 and 0.01 levels respectively; [a] indicates significance at the ≤ 0.10 level.

We see in both the fixed- and random-effects negative binomial models that the number of strong BITs already in force in a particular developing country is consistently negatively correlated with the number of new BITs that the developing country signs or ratifies, and that this negative relationship (indicated by IRRs of less than one) is statistically significant across nearly all of the negative binomial models. The result is intuitive and as predicted. Developing countries that already have entered into large numbers of strong BITs have less objective need to enter into even more BITs, and they have fewer potential BIT partners to choose from. Similar results obtain for the variable measuring the number of non-strong BITs already in force. In 16 of the 20 negative binomial specifications, developing countries with larger numbers of non-strong BITs in force have lower rates of new BIT signings and ratifications. This suggests that developing countries at least to some extent view non-strong BITs as acceptable substitutes for strong BITs.

We also see very little evidence that the willingness to enter into BITs is driven by competitive dynamics of the sort described by EGS, in which competitive pressures increase as more and more competing states adopt BITs. In the random effects models presented in Table 3.8, the number of BITs in force in the relevant region is statistically significant in only one of the ten specifications (Model V, Column One). And even in that specification, the variable is "wrongly" signed. The IRR of 0.923 suggests that the number of BITs in force in regional competitors is associated with *lower* rates of new BIT signings and ratifications. This result is, of course, consistent with my own model of competition, which suggests that where a developing country's regional competitors have already entered into greater numbers of BITs, the particular developing country under analysis will sign and ratify *fewer* BITs of its own. In the fixed-effects model presented in Table 3.9, we see similar results. The regional BIT variable is significant across eight of the specifications, but again the variable is "wrongly" signed from the perspective of EGS. IRRs are consistently less than unity, suggesting that as more regional competitors enter into BITs, incentives to enter into new BITs decline.

We also find little support for the idea that developing countries are entering into BITs in a sort of rationalistic response to past poor performance at attracting FDI. In none of the models does our measure of past "FDI penetration" (FDI/GDP) achieve anything close to a standard level of statistical significance. As a sensitivity test, I re-ran the negative binomial models substituting a five-year moving average measure of FDI penetration and a measure of the given host state's past share of world FDI inflows as measures of past FDI performance. Neither of these substitutions led to substantively different results than those presented in the Tables.

Finally, Tables 3.8 and 3.9 provide relatively strong support for the suspicion that the popularity of BITs is driven in particular by pressure from powerful international financial institutions. In three of the five models we see that developing countries that are under an IMF or World Bank loan program have statistically and substantively much more likely to sign or ratify BITs (undifferentiated by dispute settlement provisions) than are countries not benefiting from IMF or World Bank lending, with incident rate ratios of approximately 1.5 or higher. However, the IMF-World Bank lending variable fails to attain conventional levels of statistical significance in the first two models of either Table, which model the likelihood that a developing country will sign or ratify strong BITs in particular. The negative binomial results thus provides little evidence that the IMF and World Bank influence which kinds of BITs developing countries adopt, as long as they adopt a BIT of one kind or another. It is worth emphasizing that in the reported models I have assumed that IMF and World Bank influence takes place in the same period as the treaty signing or entry into force. Lagging or leading the IMF-World Bank lending variable by one period might be appropriate if we assume that the IMF and World Bank make entering a BIT a *precondition* or a *reward* of lending, respectively. Empirically speaking, leading or lagging the IMF-World Bank variable does not radically change the reported results. The IMF-World Bank variable tends to remain (or to become) significant in most, but not all, models.

Of most theoretical interest, of course, are the results for the partisanship variables and their interaction with the Berlin Wall dummy variable. In the Tables the results for both of these key variables are reported in boldface type where statistically significant at the ≤ 0.05 level (two-tailed) or better. The first thing to note is that theoretical expectations for the partisanship variables are generally strongly confirmed across the various count models. Having a leftist executive or a leftist legislature is significantly associated with a substantively meaningful in the rate of strong BIT signings and entries into force in both the random effects and fixed effects specifications (Models I and II). For example, in the random effects model of the entry into force of strong BITs (Table 3.8, Model I), we see that countries governed by leftist executives have a predicted rate of treaty entries into force that is over 70 percent lower than the rate for non-leftist countries. (The relevant IRR is 0.289). In the equivalent fixed-effects model, Table 3.9, Model I), we see that a leftist executive is associated with a rate of strong BIT entries into force that is more than 80 percent lower than the rate for non-leftist executives. We see substantively equivalent, confirmatory results for the partisanship variables (both executive and legislative) in *all* of the fixed effects models, and in six of the ten random-effects estimations. Across all of the successful models, left-controlled governments are predicted to sign or ratify between approximately one third and two thirds *fewer* BITs than non-left-controlled governments.

The partisanship variables perform the most poorly in the random effects estimations of the entry into force of all BITs (undifferentiated by dispute settlement provisions, Table 3.8 Model III), and of the signing of all BITs (undifferentiated by dispute settlement provisions, and including BITs that never entered into force, Table 3.8, Model V). This failure is not entirely surprising. We would expect any link between partisanship and BITs to be the weakest, statistically speaking, when the treaties are undifferentiated by dispute settlement provisions. In Models III and V the sample includes a relatively significant number of treaties that are substantively low-cost—low cost precisely because they do not contain guaranteed investor access to international arbitration. And because these are relatively low-cost

from a classically leftist economic and political perspective, leftist governments should not necessarily be any less willing to enter into them than their rightist counterparts.

But recall that because the models are interactive, with the partisanship variables multiplied against the Berlin Wall dummy variable, the results for the partisan government component of the interaction term represent the effects of partisanship on BIT signings or entries into force only when the Berlin Wall dummy variable equals zero. Substantively, this means that the consistently negative effects of left partisanship on rates of BIT signings and entries into force that we discussed immediately above are only relevant to the years prior to 1990. On the other hand, the results for the interaction term itself can be interpreted as representing the effects of partisanship on treaty signings and ratifications as the Berlin Wall dummy variable moves from zero to one. That is, the interaction variable represents the effects of partisanship in the years after the collapse of the Berlin Wall, and theory would suggest that in the post-Wall years the differences in the willingness of leftist and no-leftist governments to enter into BITs should decrease, even to the point, perhaps, that partisanship is no longer a statistically significant predictor of treaty signings or ratifications. In fact, the results suggest an empirical relationship rather different than expectations, but nonetheless quite interesting. In the post-1989 years the relationship between left control of government and the willingness to enter into BITs actually reverses direction. In Tables 3.7 and 3.8 the IRR for the interaction term is consistently greater than one (indicating that left-controlled governments are *more* likely to enter into BITs than non-left governments), and that this positive relationship is statistically significant across 18 of the 20 negative binomial specifications. IRRs for the interaction term are generally well over 2.00, indicating that in the post-1989 years left-controlled governments could be expected to sign or ratify more than double the number of BITs than non-left-controlled governments.

The admittedly counterintuitive results for the partisanship-Berlin Wall interaction term are not necessarily inconsistent with theory, as they indeed suggest that leftist governments radically changed

their ideas about the value of the role that BITs and FDI might play in helping them to achieve their development objectives. The specific result—that leftist governments are *more* likely to enter into BITs in the post-1989 era than their rightist counterparts— is also not necessarily inconsistent with reported partisan differences in pursuing economic liberalization more generally. For example, there is some evidence that leftist governments in post-1989 Eastern Europe were more likely to adopt radical market-opening reforms than their rightist counterparts.[72] As way of explanation, it may be the case that once leftist governments decided to begin relying on and promoting FDI inflows as part of their development strategies, they perceived a need to publicly signal their change of heart to skeptical investors. BITs provide such a signal by, in effect, offering a sort of legally enforceable warranty that these "new" leftist governments are sincere in repudiating the left's earlier hostility to foreign investment.[73]

Tables 3.10 and 3.11, below, present some suggestive (but certainly not definitive) evidence that left-dominated governments have historically had something of an investment-related image problem, and that BITs might reasonably be viewed as useful in mitigating it.

Consider Table 3.10 first. The Table shows pairwide correlation coefficients between the left partisanship variable (leftist control of the executive) and a number of different expert-survey-based measures of various kinds of foreign investment-related "risks", "attitudes", and policies. The MERA variable represents the expert-perceived risk of "nationalization" specifically in the mineral-extraction sectors of the economy, and is only available for a number of very recent years. The variable is derived from BERI, S.A.'s Mineral Extraction Risk Assessment study, which BERI, S.A. conducts for the Japanese Oil, Gas, and Metals Corporation, and covers up to 145 countries. The BERI Investment Attitude and Policy Continuity measures are also compiled from experts surveyed by BERI, S.A., and tap expert perceptions of the non-sector-specific foreign investment environment for a sample of up to 53 countries. The ICRG measure is derived from PRS Group Inc.'s International Country Risk Guide and represents expert perceptions of the quality of developing countries' policies relating to "contract

viability", "profits repatriation", and "payments delays". The ICRG measures cover up to 140 countries. Higher ratings represent a more investor-friendly environment for all four measures.

Table 3.10: Bivariate Relationship between Leftist Control of the Executive and Investment Risk

	Years	*Obs.*	*Correlation Coefficient*
MERA Nationalization Risk	1998-2000	362	-0.13*
BERI Investment Attitude	1980-2000	695	-0.43**
	1980-1989	317	-0.52**
	1990-2000	378	-0.33**
BERI Policy Continuity	1980-2000	695	-0.03
	1980-1989	317	0.12*
	1990-2000	378	-0.18**
ICRG Investment Profile	1984-2000	2275	-0.08**
	1984-1989	589	-0.13**
	1990-2000	1134	-0.03
* and ** indicate (two-tailed) significance at the $\leq$ 0.05 and 0.01 levels respectively.			

Note in particular that in most cases the relationship between the various investment-related survey measures and leftist-controlled government is negative and statistically significant. For example, experts are significantly more likely to view leftist-controlled governments as having a higher level of "nationalization risk" (the MERA measure) and to have worse "investor attitudes" (the first BERI measure). More subtly, we see some evidence that expert opinions of leftist-controlled governments have improved somewhat in the recent past—perhaps a recognition that the "new left" is not the "old left". For example, for the BERI "investment attitude" measure, the correlation coefficient is significantly lower for the the 1990-2000 period than for the 1980-1989 period. And for the ICRG "investment profile" measure, we see that in the 1990-2000 the relationship between leftist government and the investment profile measure is statistically non-significant, while it is negatively signed and highly significant in the pre-1989 period. The one contrary indicator is the BERI "policy continuity" variable, which suggests that experts' opinions along this metric have become *less* favorable in recent years.

The next table provides suggestive evidence that BITs might be useful in improving expert perceptions, though the results are sensitive to the precise expert measure used. The table presents pairwise correlation coefficients between the same expert measures used in the previous table and a weighted count variable of the number of strong BITs in force in each developing country. The construction of the weighted BIT variable is described in more detail in the following chapter. Note that there is a positive and statistically significant relationship between the BIT variable and the MERA measure of nationalization risk and for the ICRG investment profile measure, although breaking down the latter measure into two time periods suggests that adopting strong BITs did not have a statistically significant effect on expert perceptions in the years prior to 1989. Results for the BERI measures are generally a statistical wash (perhaps due to the relatively small number of countries that BERI covers).

Table 3.11: Bivariate Relationship between Weighted Strong BITs in Force and Investment Risk

	Years	*Obs.*	*Correlation Coefficient*
MERA Nationalization Risk	1998-2003	736	0.16**
BERI Investment Attitude	1980-2003	793	0.04
	1980-1989	320	0.16**
	1990-2003	473	-0.01
BERI Policy Continuity	1980-2003	793	-0.04
	1980-1989	320	-0.06
	1990-2003	473	0.02
ICRG Investment Profile	1984-2003	2135	0.29**
	1984-1989	599	-0.02
	1990-2003	1536	0.26**
Note: * and ** indicate (two-tailed) significance at the $\leq$ 0.05 and 0.01 levels respectively.			

Pairwise correlation analysis is an exceedingly weak means of testing causal arguments, and the point here is simply to suggest that investors seem, fairly or not, to perceive leftist governments to be less investor-friendly than non-leftist governments, and that BITs might reasonably be viewed as helping to overcome this investor bias. If leftist governments are adopting BITs in an attempt to whitewash over poor reputations, the strategy may be a reasonably one. This is not the same as saying that BITs succeed

in encouraging investors to actually *invest* more in countries that adopt the treaties. That particular question is explored in detail in the following chapters.

§ 3.6: Sensitivity Analysis

In this Section I explore the robustness of the negative binomial analysis discussed above to two important changes. First I present results from a model in which I dichotomize the dependent variable (the number of new BITs signed or entering into force) and estimating the resulting model using Logit techniques. The results are largely confirmatory. Second, I present results from a negative binomial model in which the dataset is aggregated into five-year periods. Here the results are noticeably weaker but not necessarily disconfirmatory. In short, the Section provides important supporting evidence that partisanship indeed "matters" in terms of the willingness to sign and ratify BITs, and especially in terms of the willingness to sign and ratify the strongest treaties.

§3.61: Logit Analysis

Because the annual count data of treaty signings and entries into force contains relatively few observations in which the count is greater than one, it is worth considering whether the model is better estimated using logistic regression, where the dependent count variable is transformed into a binary variable in which "0" indicates no new treaty signings or entries into force in a given year, and "1" indicates at least one new treaty signing or entry into force. In practice, epidemiologists routinely substitute Poisson (count) estimation techniques for binomial logit techniques, and studies suggest that coefficient estimates and standard errors will often be largely identical using either technique when the sample size is relatively large and the probability of a positive event occurring is relatively small.[74] On the other hand, in the present context substituting logit for Poisson analysis entails some loss in information:

logit requires us to treat observations characterized by multiple new treaty signings or ratifications as if only one treaty signing or ratification occurred.

Tables 3.12 and 3.13, presented immediately below, present model results where I have converted the dependent count variable to a binary variable. The model parameters are identical to those presented in the previous tables; only the construction of the dependent variables and the estimation strategy has changed. The model presented in Table 3.12 is estimated using a random effects logit estimator, and I present the full model results. The model presented in Table 3.13 is estimated using a fixed effects logit estimator. For ease of interpretation, both Tables present the results as odds ratios rather than as coefficients.

Odds ratios are roughly analogous to IRRs. For a one-unit change in the particular independent variable, the odds of a positive outcome on the dependent variable is predicted to change by the factor indicated by the odds ratio, holding all other independent variables constant. For example, an odds ratio of 0.50 for the partisanship variable would indicate that leftist governments have ½ the odds of non-leftist governments of signing (or ratifying) at least one BIT. Likewise, an odds ratio of 1.50 on the same independent variable would indicate that leftist governments have 1.5 time *greater* odds signing (or ratifying) at least one BIT. The partisanship and interaction variables are again boldfaced where statistically significant.

I should caution at the outset that random effects logit estimation in a panel setting presents can present certain difficulties that render results less than reliable. The potential difficulties stem from Stata's use of Gauss-Hermite quadrature to calculate the random-effects estimator.[75] In particular, where group sizes are large (e.g. where there are many time points per country) or where there are large correlations within groups the random-effects estimated coefficients can vary greatly depending on the number quadrature points used in the estimation. Sensitivity tests using Stata's –quadchk– routine

suggest that for some of the variables reported in Table 3.12, which reports results for the random effects logit estimations, coefficient estimates may vary by over one percent depending on the number of quadrature points used. This variability suggests that the random effects results may not be sufficiently reliable. Fortunately, fixed effects logit estimators are not estimated using quadrature. The analytic tradeoff, however, is that the fixed effects logit estimator, like its fixed effect negative binomial counterpart, necessarily leads to a loss in sample size as all-zero countries are dropped from the estimation.

Table 3.12 Partisanship and the Willingness to Sign and Ratify Strong BITs—Random Effects Logit Regression

	I. New Strong BITs In Force		II. New Strong BITs Signed		III. All New BITs In Force		IV. All New BITs Signed (Only if EIF)		V. All New BITs Signed	
# Own Strong BITs Already in Force, t-1	1.046 (1.12)	1.034 (0.82)	0.848 (4.07)**	0.850 (4.08)**	1.041 (1.16)	1.037 (1.07)	0.891 (3.17)**	0.898 (3.00)**	0.875 (3.91)**	0.880 (3.77)**
# Own Non-Strong BITs Already in Force, t-1	0.940 (1.36)	0.964 (0.85)	0.959 (0.83)	0.954 (0.96)	0.909 (2.44)*	0.919 (2.25)*	0.821 (5.12)**	0.828 (5.23)**	0.811 (5.47)**	0.823 (5.50)**
# BITs in Force in Region, t-1	0.983 (0.42)	0.992 (0.19)	0.929 (1.38)	0.947 (1.04)	0.960 (0.93)	0.966 (0.78)	0.902 (1.94)[a]	0.913 (1.72)[a]	0.906 (2.08)*	0.918 (1.82[a]
FDI Performance (FDI Inflows, % GDP), t-1	0.986 (1.03)	0.985 (1.06)	0.990 (0.68)	0.989 (0.76)	0.988 (0.88)	0.987 (0.94)	0.986 (0.92)	0.984 (1.07)	0.989 (0.82)	0.988 (0.94)
IMF or IBRD Loan Dummy	1.405 (1.78)[a]	1.439 (1.89[a]	1.367 (1.56)	1.346 (1.49)	1.907 (3.63)**	2.025 (3.93)**	1.774 (3.12)**	1.881 (3.46)**	1.663 (2.93)**	1.766 (3.29)**
Berlin Wall Dummy	13.72 (3.19)**	4.998 (2.02)*	33.234 (3.30)**	29.164 (3.00)**	4.358 (2.77)**	2.806 (1.79)[a]	3.669 (2.18)*	3.023 (1.84)[a]	16.738 (4.19)**	5.155 (2.64)**
Left Executive	**0.299 (2.96)****	**-**	**0.325 (3.25)****	**-**	0.743 (1.10)	-	**0.578 (2.00)***	**-**	0.621 (1.83)[a]	**-**
Berlin Wall*Left Executive	**3.229 (2.75)****	**-**	**2.990 (3.07)****	**-**	1.437 (1.22)	-	**1.878 (2.15)***	**-**	**1.858 (2.19)***	**-**
Left Legislature	**-**	**0.395 (2.42)***	**-**	**0.348 (3.13)****	-	0.805 (0.82)	**-**	**0.563 (2.15)***	**-**	**0.600 (2.00)***
Berlin Wall*Left Legislature	**-**	**2.607 (2.38)***	**-**	**3.55 (3.63)****	-	1.411 (1.18)	**-**	**2.411 (3.06)****	**-**	**2.291 (3.01)****
Year Dummy Variables	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Observations	3212	3120	3211	3119	3209	3117	3210	3118	3212	3120
Countries	146	144	146	144	146	144	146	144	146	144
Period	1975-2000	1975-2000	1975-2000	1975-2000	1975-2000	1975-2000	1975-2000	1975-2000	1975-2000	1975-2000
X^2	188.79**	187.99**	191.55**	191.20**	171.39**	169.84**	174.41*	183.39**	189.14**	195.56**

Notes: Estimated using logit regression (the -xtlogit- routine in Stata), with a random (unit) effects estimator. Odds ratios are reported, along with absolute-vale z-scores in parentheses. * and ** indicate (two-tailed) significance at the ≤ 0.05 and 0.01 levels respectively; [a] indicates significance at the ≤ 0.10 level.

Table 3.13: Partisanship and the Willingness to Sign and Ratify Strong BITs—Fixed Effects Logit Regression

	I. New Strong BITs In Force		II. New Strong BITs Signed		III. All New BITs In Force		IV. All New BITs Signed (Only if EIF)		V. All New BITs Signed	
# Own Strong BITs Already in Force, t-1	0.810 (5.02)**	0.796 (5.42)**	0.689 (7.76)**	0.694 (7.83)**	0.878 (3.50)**	0.876 (3.56)**	0.760 (6.42)**	0.772 (6.22)**	0.743 (7.41)**	0.754 (7.21)**
# Own Non-Strong BITs Already in Force, t-1	0.787 (3.33)**	0.817 (2.99)**	0.859 (2.37)*	0.847 (2.66)**	0.784 (5.51)**	0.797 (5.36)**	0.720 (6.75)**	0.731 (7.02)**	0.707 (7.05)**	0.721 (7.35)**
# BITs in Force in Region, t-1	0.878 (1.55)	0.885 (1.45)	0.776 (3.16)**	0.803 (2.76)**	0.827 (2.75)**	0.826 (2.75)**	0.743 (4.03)**	0.754 (3.87)**	0.759 (4.21)**	0.773 (3.95)**
FDI Performance (FDI Inflows, % GDP), t-1	0.986 (0.92)	0.985 (0.99)	0.992 (0.50)	0.991 (0.58)	0.990 (0.63)	0.989 (0.72)	0.988 (0.71)	0.985 (0.89)	0.991 (0.67)	0.989 (0.79)
IMF or IBRD Loan Dummy	1.028 (0.11)	1.183 (0.66)	1.100 (0.39)	1.130 (0.51)	1.769 (2.56)**	2.114 (3.36)**	1.572 (2.07)*	1.805 (2.72)**	1.489 (1.89)[a]	1.717 (2.57)*
Berlin Wall Dummy	131.187 (5.23)**	9.260 (2.68)**	68.031 (3.91)**	290.919 (4.77)**	23.007 (5.22)**	5.075 (2.69)**	29.391 (5.07)**	23.313 (4.68)**	136.036 (6.59)**	9.699 (3.47)**
Left Executive	**0.141 (3.91)****	**-**	**0.194 (4.06)****	**-**	**0.396 (2.71)****	-	**0.311 (3.52)****	**-**	**0.346 (3.39)****	**-**
Berlin Wall*Left Executive	**4.339 (3.02)****	**-**	**3.398 (3.12)****	**-**	**2.064 (2.14)***	-	**2.513 (2.82)****	**-**	**2.412 (2.81)****	**-**
Left Legislature	**-**	**0.211 (3.39)****	**-**	**0.215 (3.95)****	-	**0.460 (2.36)***	**-**	**0.307 (3.63)****	**-**	**0.337 (3.50)****
Berlin Wall*Left Legislature	**-**	**3.226 (2.61)****	**-**	**4.014 (3.65)****	-	1.869 (1.91)[a]	**-**	**3.237 (3.64)****	**-**	**3.053 (3.60)****
Year Dummy Variables	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Observations	2321	2271	2448	2394	2433	2383	2538	2485	2696	2617
Countries	106	104	111	109	111	109	115	113	122	119
Period	1975-2000	1975-2000	1975-2000	1975-2000	1975-2000	1975-2000	1975-2000	1975-2000	1975-2000	1975-2000
X^2	304.84**	309.49**	329.43	330.29**	214.53**	214.67**	259.64**	265.74	290.29**	292.48**

Notes: Estimated using logit regression (the -xtlogit- routine in Stata), with a fixed (unit) effects estimator. Odds ratios are reported, along with absolute-vale z-scores in parentheses. * and ** indicate (two-tailed) significance at the ≤ 0.05 and 0.01 levels respectively; [a] indicates significance at the ≤ 0.10 level.

I will not spend much time discussing the logit results for the various control variables, though in general the control variables perform substantively the same as in the negative binomial models. BITs already in force are relatively consistently associated with lower odds of signing or ratifying new BITs; past FDI performance remains a consistently non-significant influence; and Elkins et al.'s "competitive pressure" hypothesis is wholly unsupported. Note in particular that the number of regional BITs in force achieves an adequate level of statistical significance in only one of the random-effects logit models. And while the variable is significant in eight out of ten of the fixed-effects logit models, it remains "wrongly" signed in the sense that greater regional popularity of BITs is associated with *lower* odds of a developing country signing or ratifying its own new BITs. Finally, note that that we again have some evidence that the IMF and World Bank positively and significantly impact the willingness of developing countries to sign and ratify BITs. The effect is again not statistically significant when we look exclusively at strong BITs, though note that in Table 3.12, Models I and II, the IMF-World Bank lending variable approaches statistical significance. In the models which do not differentiate BITs by dispute settlement provisions, the IMF-World Bank lending variable is statistically significant at the ≤ 0.01 level, with odds ratios ranging from 1.572 (Table 3.13, Model IV) to 2.025 (Table 3.12, Model III). These results suggest that developing countries that are under an IMF or World Bank loan have between 50 and 100 percent greater odds of signing or ratifying a BIT in a given year than do developing countries that are not availing themselves of IMF or World Bank lending facilities.

As to the performance of the partisanship and interaction variables, note that the results of the logit specifications are quite consistent with the results of the negative binomial

estimations. In sixteen out of twenty of the logit specifications we see that developing countries controlled by leftist executives or legislatures were significantly and substantively less likely to enter into new BITs in the pre-1990 era. In the successful logit models odds ratios for the partisanship variables range from 0.141 (Table 3.13, Model I) to 0.600 (Table 3.12, Model V). This suggests that at the lower bounds left-controlled governments in the pre-1990 era had just *one-seventh* the odds of entering into BITs in a given year than did their non-leftist counterparts. At the upper bounds the estimated effect is more modest, but still important: an odds ratio of 0.600 implies that left-controlled governments had three fifths the odds of non-left governments of entering a BIT.

We also see very consistent results for the interaction term. In seventeen of the twenty logit specifications the interaction term is statistically significant and "positively" signed, with odds ratios greater than unity. This again suggests quite strongly that in the post-1989 era the relationship between left partisanship and BITs reversed quite dramatically. Whereas we have strong evidence that left governments in the earlier era tended to avoid using BITs to attract FDI, and to especially avoid *strong* BITs, in the post-1989 era leftist governments were much more likely to enter into BITs. This relationship holds whether we consider only strong BITs, or whether we consider BITs undifferentiated by dispute settlement, whether we focus on dates of signing or of entry into force, whether we focus on left control of the executive or of parliament, and whether elect to model country-level fixed or random effects. The odds ratios for the interaction terms range from a low of 1.858 (Table 3.12, Model V) to a high of 4.339 (Table 3.13, Model I). In other words, in a given (post-1989) year left-controlled governments have odds of signing or ratifying BITs that are nearly two to over four times greater than the equivalent odds for non-left governments.

§ 3.62: Five-Year Period Analysis

As a further sensitivity analysis, I re-estimated the negative binomial models after converting the original dataset's annual observations into six five-year periods. The first period begins in 1975 and runs through 1979; the last period begins in 1995 and runs through 1999. The dependent variables are constructed by subtracting the cumulative number of BITs signed (or in force) at the beginning of the particular five-year period from the cumulative number signed or in force at the end of the particular five-year period. The most immediate effect of this alternative calculation is to increase the number of non-zero "counts" of new BITs beyond those contained in the annualized data. The Table immediately below shows the frequency of different values of the dependent variable "New Strong BITs In Force, 5-Year Difference", as used in Table 3.16, Model I. The data remains overdispersed, which suggests that negative binomial rather than Poisson estimation remains more appropriate.

Table 3.14: New Strong BITs EIF, Five-Year Periods

Count	*Frequency*	*Percent*	*Cumulative Percent*
0	462	74.16	74.16
1	57	9.15	83.31
2	39	6.26	89.57
3	16	2.57	92.13
4	19	3.05	95.18
5	7	1.12	96.31
6	10	1.61	97.91
7	4	0.64	98.56
8	2	0.32	98.88
9	2	0.32	99.20
10	2	0.32	99.52
11	3	0.48	100.00
Note: Sample corresponds to that estimated in Table 3.16, Model I.			

Model parameters are essentially the same as those for the annualized models presented above. However, each variable has been reconstructed to reflect the five-year periodicity of the new model. In particular, the variables measuring the number of strong and non-strong BITs in force in the observed country are now lagged five periods. The measure of the "competition for capital" (the number of BITs in force in geographically proximate developing countries, divided by the number of countries in the region) has been converted into a period average, as have the FDI performance and the IMF-World Bank lending variables. The Berlin Wall dummy variable remains dichotomous. Each period entirely comprises either pre- or post-Wall years, and is coded as "0" or "1" accordingly.

The partisan government variables are also calculated as period averages. This means, for example, that if a given developing country was governed by a leftist executive for two out of the five years of a given period, the left executive variable would take on a value of 0.20. In practice, in almost all cases countries are either governed by leftist leaders over the entire period (producing a score of 1) or not at all (producing a score of 0). The Table immediately below tabulates the partisan chief executive variable for the sample of observations used in Table 3.16, Model I. Note that one observation in the sample has a value of 0.75, while another has a value of 0.33. This reflects the fact that data on partisanship was available for those observations for only four and three of the five years in the particular periods, respectively.

Table 3.15: Partisan Executive, 5-Year Period Average

Value	*Frequency*	*Percent*	*Cumulative Percent*
0	366	58.75	58.75
.2	19	3.05	61.80
.33	1	0.16	61.96
.4	21	3.37	65.33
.6	13	2.09	67.42
.75	1	0.16	67.58
.8	11	1.77	69.34
1	191	30.66	100.00
Note: Sample corresponds to that estimated in Model I, Table 3.16			

Unlike the models using the annualized dataset, the period models do not contain time (period) dummy variables. Including period dummies causes unacceptable levels of multicollinearity between the dummies and the Berlin Wall dummy variable and forces Stata to drop the latter variable from the analysis. Country dummies are also again omitted because including country dummies causes certain of the models to refuse to converge.

The results for the control variables are generally consistent with the results for the control variables in the annualized models. We see once again that there is little evidence that BIT signings and ratifications are driven by "competitive" pressures. The adjusted number of BITs in force in the geographic region is statistically insignificant in all but two of the 19 models.* Past FDI performance is also a consistently insignificant predictor of BIT signings and entry into force. We also again see mixed but generally confirmatory evidence that BIT signings and ratifications are driven in part by the influence of the IMF and World Bank. In all of the random-effects models the fact that a developing country is under an IMF or World Bank loan significantly and positively influences the rate of BIT signings and

* Table 3.16, Model IB failed to converge. Results are omitted from the Table because they could not be obtained.

entries into force. In the fixed-effects period models the IMF-World Bank variable is statistically significant and positively signed in half of the estimated models.

The periodized models generally perform less consistently with the annualized models as to the main variables of interest. For example, the partisanship variables attain statistical significance in only four of the nine random-effects models (Table 3.16, Models IA, IIA, IIB, & IIIA). In the fixed-effects models, the partisanship variable attains statistical significance in six of the ten models (Table 3.17, Models IA, IB, IIA, IIIA, IIIB, IVA). The periodized models thus provide rather mixed evidence that left-controlled governments were less willing to sign or ratify BITs in the pre-1990 era than non-left-controlled governments. But it is encouraging that the left partisan variables *are* generally significant in the models predicting the signing or entry into force of *strong* BITs, because it is in relation to these kinds of BITs that we would most expect partisanship to matter.

The results for the interaction variable in the periodized models represent the effects of partisanship on BIT signings and ratifications in the post-1989 period, just as they did in the annualized models. Recall that in the annualized models we found very consistent evidence that leftist-controlled governments in the 1990s were significantly *more* likely than non-left governments to sign and ratify BITs. Here the evidence is less consistent, but more in accord with the original theory that partisan differences should become less noticeable in the post-1989 era. For example, the interaction variable is significant in only two of the nine random-effects models (Table 3.16, Models IA, IIA). Positive IRRs in those models suggest that when developing countries whose executives are controlled by leftist parties are predicted to enter into between two and three times as many *strong* BITs as non-left-controlled developing countries. But when BITs are aggregated and undifferentiated by

dispute settlement provisions, partisanship fades from significance. We see very similar results in the fixed-effects models presented in Table 3.17 (Models IA, IIIA).

Table 3.16: Partisanship and the Willingness to Sign and Ratify Strong BITs—Random Effects Negative Binomial Regression, Five-Year Period Averages

	I. New Strong BITs In Force, 5-Year Difference		II. New Strong BITs Signed, 5-Year Difference		III. All New BITs In Force, 5-Year Difference		IV. All New BITs Signed (Only EIF), 5-Year Diff.		V. All New BITs Signed, 5-Year Difference.	
	A	B	A	B	A	B	A	B	A	B
# Own Strong BITs Already in Force, t-5	1.137 (4.78)**	-	0.941 (1.22)	0.952 (0.92)	1.127 (4.39)**	1.127 (4.38)**	0.964 (0.83)	0.970 (0.69)	0.981 (0.44)	0.989 (0.24)
# Own Non-Strong BITs Already in Force, t-5	1.027 (0.83)	-	1.048 (1.22)	1.041 (1.07)	1.028 (0.92)	1.023 (0.76)	0.959 (1.18)	0.958 (1.22)	0.955 (1.33)	0.956 (1.25)
# BITs in Force in Region, Period Avg.	1.017 (0.60)	-	1.040 (1.07)	1.044 (1.15)	1.004 (0.16)	1.012 (0.43)	1.017 (0.49)	1.026 (0.76)	1.021 (0.68)	1.027 (0.86)
FDI Performance (FDI Inflows, % GDP), Period Avg.	0.996 (0.25)	-	0.988 (0.58)	0.987 (0.65)	0.995 (0.34)	0.992 (0.47)	0.989 (0.58)	0.987 (0.69)	0.996 (0.27)	0.994 (0.39)
IMF or IBRD Loan Dummy,. Period Avg.	1.698 (3.01)**	-	1.845 (3.03)**	1.725 (2.68)**	1.799 (3.59)**	1.764 (3.41)**	2.002 (3.67)**	1.897 (3.36)**	1.806 (3.37)**	1.682 (2.92)**
Berlin Wall Dummy	3.520 (5.55)**	-	3.860 (6.36)**	3.862 (6.07)**	2.403 (4.41)**	2.474 (4.39)**	2.867 (5.32)**	2.862 (5.13)**	2.881 (5.56)**	2.919 (5.43)**
Left Executive, Period Avg.	**0.273 (2.78)****	-	**0.403 (2.58)****	**-**	**0.504 (2.24)***	-	0.662 (1.51)	-	0.714 (1.30)	-
Berlin Wall*Left Executive	**3.206 (2.30)***	-	**2.190 (2.05)***	-	1.904 (1.79)[a]	-	1.443 (1.18)	-	1.470 (1.28)	-
Left Legislature, Period Avg.	-	**-**	-	**0.513 (1.96)***	-	0.602 (1.69)[a]	-	0.776 (0.94)	-	0.826 (0.75)
Berlin Wall*Left Legislature	-	**-**	-	2.077 (1.94)	-	1.708 (1.50)	-	1.407 (1.09)	-	1.364 (1.03)
Period Dummies	No	No	No	No	No	No	No	No	No	No
Observations	623	-	623	605	623	605	623	605	623	605
Countries	146	-	146	143	146	143	146	143	146	143
Last Year in Each 5-Year Period	'79, '84, '89, '94, '99	'79, '84, '89, '94, '99	'79, '84, '89, '94, '99	'79, '84, '89, '94, '99	'79, '84, '89, '94, '99	'79, '84, '89, '94, '99	'79, '84, '89, '94, '99	'79, '84, '89, '94, '99	'79, '84, '89, '94, '99	'79, '84, '89, '94, '99
X^2	138.17**	-	121.86	118.08	119.59	119.91	91.73**	88.96**	100.29**	96.57**

Notes: Estimated using negative binomial regression, with random country-specific dispersion levels. Incident rate ratios (exponentiated coefficients) are reported, with absolute-value z-scores in parentheses. * and ** indicate (two-tailed) significance at the ≤ 0.05 and 0.01 levels respectively.

Table 3.17: Partisanship and the Willingness to Sign and Ratify Strong BITs—Fixed Effects Negative Binomial Regression, Five-Year Period Averages

	I. New Strong BITs In Force, 5-Year Difference		II. New Strong BITs Signed, 5-Year Difference		III. All New BITs In Force, 5-Year Difference		IV. All New BITs Signed (Only EIF), 5-Year Diff.		V. All New BITs Signed, 5-Year Difference	
	A	B	A	B	A	B	A	B	A	B
# Own Strong BITs Already in Force, t-5	0.844 (2.78)**	0.839 (2.90)**	0.790 (4.15)**	0.795 (4.07)**	0.931 (1.48)	0.931 (1.51)	0.852 (3.29)**	0.857 (3.20)**	0.856 (3.26)**	0.859 (3.22)**
# Own Non-Strong BITs Already in Force, t-5	1.140 (2.04)*	1.138 (1.97)*	1.140 (2.35)*	1.144 (2.43)*	0.889 (2.44)*	0.886 (2.52)*	0.905 (2.49)*	0.907 (2.47)*	0.896 (2.78)**	0.896 (2.78)**
# BITs in Force in Region, Period Avg.	1.217 (2.59)**	1.240 (2.77)**	1.096 (1.52)	1.113 (1.73)	1.086 (1.45)	1.103 (1.67)	1.013 (0.24)	1.028 (0.53)	1.045 (0.92)	1.058 (1.16)
FDI Perf. (FDI Inflows, % GDP), Period Avg..	0.957 (1.16)	0.953 (1.23)	0.984 (0.55)	0.981 (0.62)	0.977 (0.74)	0.974 (0.83)	0.997 (0.11)	0.994 (0.23)	1.004 (0.14)	1.000 (0.03)
IMF or IBRD Loan Dummy,. Period Avg.	1.523 (1.16)	1.744 (1.54)	1.491 (1.33)	1.509 (1.38)	1.814 (1.92)	2.054 (2.33)*	1.830 (2.25)*	1.862 (2.34)*	1.808 (2.29)*	1.820 (2.34)*
Berlin Wall Dummy	4.009 (5.44)**	4.461 (5.63)**	4.465 (6.63)**	4.425 (6.64)*	3.002 (4.97)**	3.111 (4.95)**	3.657 (6.30)**	3.578 (6.02)*	3.454 (6.17)**	3.474 (6.01)**
Left Executive, Period Avg.	**0.221 (2.82)****	-	**0.357 (2.62)****	-	**0.317 (2.99)****	-	**0.491 (2.21)***	-	0.570 (1.83)	-
Berlin Wall*Left Executive	**3.161 (2.09)***	-	1.824 (1.47)	-	**2.475 (2.20)***	-	1.386 (0.97)	-	1.419 (1.07)	-
Left Legislature, Period Avg.	-	**0.324 (2.21)***	-	0.492 (1.82)[a]	-	**0.417 (2.33)***	-	0.620 (1.49)	-	0.686 (1.22)
Berlin Wall*Left Legislature	-	2.187 (1.49)	-	1.721 (1.35)	-	2.088 (1.80)	-	1.381 (0.94)	-	1.342 (0.89)
Period Dummies	No	No	No	No	No	No	No	No	No	No
Observations	421	411	446	440	444	434	464	458	492	486
Countries	86	85	91	90	91	90	95	95	101	101
Last Year in Each 5-Year Period	'79, '84, '89, '94, '99	'79, '84, '89, '94, '99	'79, '84, '89, '94, '99	'79, '84, '89, '94, '99	'79, '84, '89, '94, '99	'79, '84, '89, '94, '99	'79, '84, '89, '94, '99	'79, '84, '89, '94, '99	'79, '84, '89, '94, '99	'79, '84, '89, '94, '99
X^2	100.16**	103.81**	125.12**	122.51**	87.61**	89.61**	97.50**	94.39**	103.07**	101.47**

Notes: Estimated using negative binomial regression with fixed country-specific dispersion levels. Incident rate ratios (exponentiated coefficients) are reported, with absolute-value z-scores in parentheses. * and ** indicate (two-tailed) significance at the ≤ 0.05 and 0.01 levels respectively.

[1] Alexander Wendt, *Anarchy is what States Make of it: The Social Construction of Power Politics*, 46 INT'L ORG. 391 (1992).

[2] KENNETH WALTZ, THEORY OF INTERNATIONAL POLITICS (1979).

[3] *Compare* Waltz, *supra* note 2, *with* STEPHEN WALT, THE ORIGIN OF ALLIANCES (1987).

[4] *Compare* Robert O. Keohane & Lisa L. Martin, *The Promise of Institutionalist Theory*, 20 INT'L SECURITY 39 (1995) *with* John J. Mearsheimer, *The False Promise of International Institutions*, 19 INT'L SECURITY 7 (1994/95).

[5] *See, e.g.*, VALERIE M. HUDSON, ED., CULTURE AND FOREIGN POLICY (1997).

[6] *See, e.g.*, SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER (1996).

[7] See the large literature on the "democratic peace," the originator of which is Bruce Russett's GRASPING THE DEMOCRATIC PEACE (1993).

[8] J. David Singer, *The Levels-of-Analysis Problem in International Relations*, 16 WORLD POLITICS 77, 85 (1961).

[9] See, e.g., Wagner's 1974 review essay. R. Harrison Wagner, *Dissolving the State: Three Recent Perspectives on International Relations*, 28 INT'L ORG. 435 (1974).

[10] Singer, *supra* note 8, at 88-89.

[11] Daniel L. Byman and Kenneth M. Pollack, *Let Us Now Praise Great Men: Bringing the Statesman Back In*, 25 INT'L SEC. 107 (2001).

[12] *Id.* at 111.

[13] "Not ideas, but material and ideal interests, directly govern men's conduct. Yet very frequently the 'world images' that have been created by 'ideas' have, like switchmen, determined the tracks along which action has been pushed by the dynamic of interest." MAX WEBER, THE SOCIAL PSYCHOLOGY OF THE WORLD RELIGIONS, *reprinted in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 280 (H. H. Gerth & C. W. Mills eds., 1958).

[14] Craig Parsons, *Showing Ideas as Causes: The Origins of the European Union*, 56 INT'L ORG. 47, 48 (2002).

[15] *Id.* at 49.

[16] Peter A. Hall, "Conclusion: The Politics of Keynesian Ideas", *in* THE POLITICAL POWER OF ECONOMIC IDEAS: KEYNESIANISM ACROSS NATIONS 366 (Peter A. Hall ed., 1989).

[17] Robert H. Jackson, "The Weight of Ideas in Decolonization: Normative Change in International Relations," *in* IDEAS & FOREIGN POLICY: BELIEFS, INSTITUTIONS, AND POLITICAL CHANGE 111-38 (Judith Goldstein & Robert O. Keohane eds., 1993).

[18] Parsons, *supra* note 14; Geoffrey Garrett & Barry R. Weingast, Ideas, "Interests, and Institutions: Constructing the European Community's Internal Market," *in* IDEAS & FOREIGN POLICY: BELIEFS, INSTITUTIONS, AND POLITICAL CHANGE 173-206 (Judith Goldstein & Robert O. Keohane eds., 1993).

[19] Judith Goldstein & Robert O. Keohane, "Ideas and Foreign Policy: An Analytic Framework," *in* IDEAS & FOREIGN POLICY: BELIEFS, INSTITUTIONS, AND POLITICAL CHANGE 3, 13 (Judith Goldstein & Robert O. Keohane eds., 1993).

[20] Kathryn Sikkink, "Development Ideas in Latin America: Paradigm Shift and the Economic Commission for Latin America," *in* INTERNATIONAL DEVELOPMENT AND THE SOCIAL SCIENCES: ESSAYS ON THE HISTORY AND POLITICS OF KNOWLEDGE 228, 234 (Frederick Cooper ed., 1997).

[21] Goldstein & Keohane, *supra* note 18, at 13.

[22] Strictly speaking, not all ideational theorists are committed to agent-level analysis. A significant portion of the literature, especially that of the "constructivist" sort, emphasizes the "shared nature" of ideas. *See* Martha Finnemore & Kathryn Sikkink, *Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics*, 4 ANN. REV. POL. SCI. 391, 406 (2001). In this vein, Alexander Wendt, the most important of the constructivists, attributes "ideas" to states themselves, as is evident by the title of his influential article, *Anarchy Is What States Makes of It*, 46 INT'L ORG. 391 (1992).

[23] Thomas S. Mowle, *Worldviews in Foreign Policy: Realism, Liberalism, and External Conflict*, 24 POL. PSYCH. 561 (2003).

[24] *See* John Kurt Jacobsen, *Much Ado About Ideas: The Cognitive Factor in Economic Policy*, 47 WORLD POL. 283, 285 (1995); *cf.* Mark M. Blyth, *Any More Bright Ideas? The Ideational Turn of Comparative Political Economy*, 29 COMP. POL. 229, 246 (1997).

[25] A transcript of Castro's speech is available at http://lanic.utexas.edu/la/cb/cuba/castro/1993/19930727.

[26] The law is Ley 77 de Inversión Extranjera, Sep't 5, 1995, and is available at http://www.cubagov.cu/ingles/otras info/cpi/ley.htm.

[27] Ignacio Sánchez-Cuenca, *Party Moderation and Politicians' Ideological Rigidity*, 10 PARTY POL. 325 (2004).

[28] Richard R. Lau & David P. Redlawsk, *Advantages and Disadvantages of Cognitive Heuristics in Political Decision Making*, 45 AMER. J. POL. SCI. 951, 953 (2001).

[29] Paul R. Brewer & Marco R. Steenbergen, *All Against All: How Beliefs About Human Nature Shape Foreign Policy Opinions*, 23 POL. PSYCH. 39 (2002).

[30] Allison Astorino-Courtois, *The Effects of Stakes and Threats on Foreign Policy Decision-Making*, 21 POL. PSYCH. 489 (2001).

[31] FRANKLIN TUGWELL, THE POLITICS OF OIL IN VENEZUELA 151-53 (1975).

[32] Mowle, *supra* note 23, at 564.

[33] *Id.*

[34] Gary Marks et al., *National Political Parties ad European Integration*, 46 AMER. J. POL. SCI. 585 (2002).

[35] Gary Marks and Carole J. Wilson, *The Past in the Present: A Cleavage Theory of Party Response to European Integration*, 30 Brit. J. Pol. Sci. 433, 434, (2000)

[36] EVELYNE HUBER & JOHN D. STEPHENS, DEVELOPMENT AND CRISIS OF THE WELFARE STATE (2001).

[37] David Bradley et al., *Distribution and Redistribution in Postindustrial Democracies*, 55 WORLD POL. 193 (2003) (finding that government partisanship helps to explain policies designed to redistribute income); Stephanie Moller et al., *Determinants of Relative Poverty in Advanced Capitalist Democracies*, 68 AMER. SOC. REV. 22 (2003) (finding that government partisanship helps to explain poverty levels); James P. Allan & Lyle Scruggs. *Political Partisanship and Welfare State Reform in Advanced Industrial Societies*, 48 AMER. J. POL. SCI. 496 (2004) (finding that "traditional partisanship continues to have a considerable effect on welfare state entitlements").

[38] Benjamin O. Fordham & Timothy J. McKeown, *Selection and Influence: Interest Groups and Congressional Voting on Trade Policy*, 57 INT'L ORG. 519, 523 (2003).

[39] UNCTAD, BILATERAL INVESTMENT TREATIES IN THE MID-1990S 1 n.3 (1998). Article 12(d)(iv) of the Convention Establishing the Multilateral Investment Guarantee Agency requires MIGA to "satisfy itself as to: (iv) the investment conditions in the host country, including the availability of fair and equitable treatment and legal protection for the investment."

[40] For an argument along these lines, see Patrick Juillard, *Le réseau français des conventions bilatérales d'investissement: à la recherché d'un droit perdu?* 13 Droit et Practique du Commerce Int'l 9, 57-9 (1987).

[41] This is (or was) the case with the German, French, Swedish, and Swiss BIT and investment insurance programs. THEODOR MERON, INVESTMENT INSURANCE IN INTERNATIONAL LAW 40-1 (1976) (France, Germany, Sweden); Heinrich Klebes, Encouragement et Protection des Investissements Privés Dans les Pays en Développement : Les Traités Bilatéraux de la République d'Allemagne Dans Leur Contexte 63 (1983) (doctoral dissertation, University of Strasbourg) (Germany) ; Matthias-Charles Krafft, "Les Accords Bilateraux sur la Protection des Investissements Conclus par la Suisse", *in* FOREIGN INVESTMENT IN THE PRESENT AND A NEW INTERNATIONAL ECONOMIC ORDER 72, 88 (Dicke, ed. 1987) (Switzerland) ; Patrick Juillard, *Les conventions bilatérales d'investissement conclue par la France,* 106 J. DROIT INT'L 274, 282-83 (1979) (France). Klebes says that while signing a BIT was not an absolute pre-condition to receiving German investment insurance, it was an "important criteria", and apparently often a decisive one. *Id.* at 63, 70-73. Klebes also notes that signing a German BIT could also unlock access to state-sponsored "credit facilities and certain fiscal advantages." *Id.* at 63. French and Swiss authorities also appear to have had some measure of discretion in deciding whether to insure a project in the absence of a BIT, though the extent of the discretion or its exercise is unclear.

[42] Charles N. Brower & Jarrod Wong, "General Valuation Principles: the Case of Santa Elena", *in* INTERNATIONAL INVESTMENT LAW AND ARBITRATION : LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 747 (Weiler, ed., 2005).

[43] U.S. Policy Toward International Investment, Hearings Before the Subcommittee on International Economic Policy of the Committee on Foreign Relations, United States Senate, July 30, Sept. 20, and Oct. 28 1981, at 173 (prepared statement of Richard W. Roberts, President, National Foreign Trade Council).

[44] The only attempt of which I am aware to empirically test the effects of partisanship and political ideology on whether individuals indeed tend to "think like economists" suggests that the results depend very heavily on the particular policy area at issue. Bryan Kaplan, *What Makes People Think like Economists? Evidence on Economic Cognition from the "Survey of Americans and Economists on the Economy"*, 44 J. L. & ECON. 395, 413-414 (2001).

[45] For reviews on the debate about the link between FDI and economic growth, see Indra de Soysa & John R. Oneal, *Boon or Bane? Reassessing the Productivity of Foreign Direct Investment*, 64 AM. SOC. REV. 766 (1999) *and* Andres Rodriguez-Clare, *Multinationals, Linkages, and Economic Development*, 86 AM. ECON. REV. 852 (1996).

[46] *See* Prakash Loungani&Assaf Razin, *How Beneficial is Foreign Direct Investment for Developing Countries?*, 38 FIN. & DEV. (June 2001), *available at* http://www.imf.org/external/pubs/ft/fandd/2001/06/loungani.htm. (noting that "developing countries should be cautious about taking too uncritical an attitude toward the benefit of FDI", and that "transfer of control [of domestic companies to foreigners] may not always benefit the host country because of the circumstances under which it occurs, problems of adverse selection, or excessive leverage.").

[47] KATHRYN SIKKINK, IDEAS AND INSTITUTIONS: DEVELOPMENTALISM IN BRAZIL AND ARGENTINA 19 (1991).

[48] See, for instance, www.bilaterals.org, which is "is a collective effort to share information and stimulate cooperation against bilateral trade and investment agreements that are opening countries to the deepest forms of penetration by transnational corporations."

[49] By the 1970s, the *dependencia* perspective was thoroughly incorporated in leftist political thought, as is evident in the 1981 special double issue of the journal Latin American Perspetives, which focused exclusively on the subject of "Dependency and Marxism."

[50] MAGNUS BLOSTROM & BJORN HETTNE, DEVELOPMENT THEORY IN TRANSITION: THE DEPENDENCY DEBATE AND BEYOND: THIRD WORLD RESPONSES 43 (1984).

[51] *See, e.g.*, Kathryn Sikkink, Development Ideas in Latin America: Paradigm Shift and the Economic Commission for Latin America, *in* INTERNATIONAL DEVELOPMENT AND THE SOCIAL SCIENCES: ESSAYS ON THE HISTORY AND POLITICS OF KNOWLEDGE 228, 235 & n.14 (Frederick Cooper ed., 1997).

[52] Juliet Johnson, *Path Contingency in Postcommunist Transformations*, 33 COMP. POL. 253, 257 (2001).

[53] On the influence of the Marxist tradition on dependency theory, see generally MAGNUS BLOSTROM & BJORN HETTNE, DEVELOPMENT THEORY IN TRANSITION: THE DEPENDENCY DEBATE AND BEYOND: THIRD WORLD RESPONSES (1984).

[54] Fukuyama's being the most famous statement of the thesis. FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992).

[55] Bronislaw Oyranowski and Magda Paleczny-Zapp, *From One Economic Ideology to Another: Poland's Transition from Socialism to Capitalism*, 7 INT'L J. POL., CULTURE, AND SOC. 43, 47 (1993).

[56] Sikkink, *supra* note 51, at 242-43.

[57] Virginia Gray, *Innovation in the States: A Diffusion Study*, 67 AMER. POL. SCI. REV. 1174 (1973).

[58] Marc Howard & Elizabeth Homer, *Galton's Problem in Cross-National Research*, 29 WORLD POLITICS 1, 2 (1976).

[59] Roslyn Simonwitz, *Evaluating Conflict Research on the Diffusion of War*, 35 J. PEACE RESEARCH 211, 229-30 (1998).

[60] Zachary Elkins et al., *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000*, 60 INT'L ORG. 811 (2006).

[61] Beth A. Simmons et al., *Introduction : The International Diffusion of Liberalism*, 60 INT'L ORG. 781 (2006).

[62] A Colin Cameron & Pravin K. Trivedi, *Econometric Models Based on Count Data: Comparisons and Applications of Some Estimators and Tests*, 1 J. APPLIED ECONOMETRICS 29, 31 (1986).

[63] Beck, Thorsetn et al., *New tools in comparative political economy: The Database of Political Institutions.* 15 WORLD BANK ECON. REV. 165 (2001).

[64] Elkins et al., *supra* note 60, at 842.

[65] I use the Correlates of War Project's (COW) list of states to identify 9 separate regions. COW assigns each of the world's states an identification number, with states in a given geographic region sharing a number within 100-number range. For example, North American and Central American states are given identification numbers from 0 to 99, South American states, from 100 to 199, and so on.

[66] RICHARD D. ROBINSON, NATIONAL CONTROL OF FOREIGN BUSINESS ENTRY: A SURVEY OF FIFTEEN COUNTRIES 329 (1976).

[67] Paul Cook & Colin Kirkpatrick, *Globalization, Regionalization, and Third World Development*, 31 *Regional Studies* 55 (1997).

[68] Elkins et al., *supra* note 60, at 830.

[69] *See, e.g.*, Edward Crenshaw, *Foreign Investment as a Dependent Variable: Determinants of Foreign Investment and Capital Penetration in Developing Nations, 1967-1978*. 69 SOCIAL FORCES 1169, 1173 (1991).

[70] *See* Nathaniel Beck et al., *Taking Time Seriously: Time-Series-Cross-Section Analysis with a Binary Dependent Variable*, 42 AMER. J. POL. SCIENCE 1260 (1998) (advocating the use of year dummy variables in time-series-cross-section models with binary dependent variables to control for temporal dependence).

[71] Coefficients in negative binomial regressions represent the difference between the logs of expected counts. Formally speaking, "$\beta = \log(\mu_{x+1}) - \log(\mu_x)$, where β is the regression coefficient, μ is the expected count and the subscripts represent where the predictor variable, say x, is evaluated at x and x+1 (implying a one unit change in the predictor variable x)." UCLA Academic Technology Services, "Annotated Output: Poisson Regression", *at* http://www.ats.ucla.edu/stat/stata/output/stata_poisson_output.htm.

[72] This appears to be the case with Hungary. *See* Janos Kornai, "The Political Economy of the Hungarian Stabilization and Austerity Program", *in* MACROECONOMIC STABILIZATION IN TRANSITION ECONOMIES 172, 196-98 (Blejer & Skreb, eds., 1997).

[73] In this view, BITs may serve as "cost-risking default contingent signals", in the language of the marketing-studies literature. *See* Amna Kirmani & Akshay R. Rao, *No Pain, No Gain: A Critical Review of the Literature on Signaling Unobservable Product Quality*, 64 J. MARKETING 66, 71-72 (2000).

[74] *See* Martina Mittlböck & Harald Heinzl, *A note on R^2 measures for Poisson and logistic regression models when both models are applicable*, 54 J. CLINICAL EPIDEMIOLOGY 99 (2001).

[75] The quadrature problem is discussed in Stata's Cross-Sectional Time-Series (XT) manual, under the entry for "quadchk".

CHAPTER FOUR

BITS & FDI: A REPLICATION & CRITIQUE OF EXISTING STUDIES

§4.1: Introduction

Neumayer and Spess recently published in the journal *World Development* an article of great practical importance to the world's capital-hungry developing countries.[1] Their article presented the first published, peer-reviewed, methodologically sophisticated econometric analysis of the effects that BITs might have on FDI inflows. To skeptics of the utility of international law generally, and of the desirability of BITs specifically, the results are startling. The authors present what they describe as robust evidence that developing states that sign BITs enjoy relatively massive increases in FDI inflows. The article seems to put the lie to the assertion of Sornarajah, a prominent critic of BITs, that the effect of BITs on FDI is an "untested hypothesis" and merely an "assumption," and that "[s]tability and other factors have a greater influence on investment flows than do investment treaties."[2]

Or does it? In this Chapter I discuss, replicate, and critique Neumayer and Spess's study. In short, the Chapter attempts to take seriously Bueno de Mesquita's recent point that "findings" do not begin to "take on the role of knowledge" unless they are "capable of being replicated using different data sets" and "different measures." Let me emphasize at the outset, though, that my overall aim here is *not* to criticize Neumayer and Spess's work as shoddy (it certainly is not) or as "mistaken." It is instead simply to

> bolster confidence that [their] research findings are not merely tied to a particular moment in time or to a particular way of defining a concept….If a hypothesis, model, or

> theory is viewed as a plausible account of how some aspect of international relations works, then findings that falsify or challenge that account are an important part of the scientific process. Indeed, discovery of such falsifying or challenging evidence through replication is fundamental to the acquisition of reliable knowledge.[3]

Falsification is especially important in the social sciences, which for a number of reasons, largely institutional in nature, tend to promote and encourage the dissemination of "positive" findings that confirm theory rather than negative ones that do not. This Chapter tries in its own small way to correct for that inherent confirmatory bias, not to be contrary, but precisely because the research question is so important.

§4.2: The Basic Replication Model—Dependent Variables

There are three obvious metrics for examining the effectiveness of BITs (or of any other policy change) at attracting FDI. First, and most crudely, we can examine whether BITs are associated with an increase in *absolute flows of investment*. Second, if we tend to view developing countries as primarily engaged in a "competition" with other countries for FDI that would be made in one country but not another, then we might wish to examine whether BITs are associated with an increase in a given country's *share of world FDI inflows*. States that capture a greater slice of the total pie are, presumably, closer to victory in the competition than others who must content themselves with a smaller portion. Neumayer and Spess primarily adopt this "competition" view of BITs, and with some justification, as the competition story also motivates Elkins, Guzman, and Simmons' recent study of the reasons why developing states have signed the treaties.[4] Finally, and in my view most reasonably of all, it seems fair to assume that developing countries themselves are primarily interested in increasing the *importance of FDI in their domestic economies*, especially where the investment is market-seeking and where, therefore, the "competition" for the investment is necessarily muted. If Wal-Mart is willing to invest in Venezuela, for example, than it hardly seems as if Venezuela should care that Wal-Mart is also investing (and perhaps investing more) in Mexico and China. Here what matters is whether BITs are associated with an increase in FDI inflows as

a share of the domestic economy, which we can measure as FDI inflows as a percent of gross domestic product (GDP). We can usefully think of this metric as one of FDI "penetration",[5] and I refer to it as such below. Neumayer and Spess's models include only the first two metrics. I follow their example in this section, but include an analysis of the effect of BITs on FDI inflows as percent of GDP in Chapter V, where I present a more fully specified and original empirical model.

My dependent variables in the models analyzed in the current Section are, accordingly, the constant-dollar value of net FDI inflows that a given host country receives in a given year, and the value of those of those inflows as a proportion of total world FDI inflows in the same year.[6] FDI data is taken from UNCTAD and from the World Bank's World Development Indicators (WDI). Neumayer and Spess take the natural log of their dependent variables. I argue in Section IV of this Chapter that this transformation is probably not justified, but for the moment I follow their example, albeit with one important caveat. A number of observations (generally over 100, depending on the sample) contain negative entries, which represent the fact that foreign investors have, in a given year and on net, removed more FDI from the country than they have brought in. Net disinvestment is particularly pronounced in the 1970s, when certain countries, such as Chile, engaged in mass expropriations and other investor-unfriendly behavior, but there are also instances of net disinvestment across the years of the sample. The problem this poses for logarithmic transformations is that the log of a negative number, like the log of zero, is undefined. Neumayer and Spess cure this problem by arbitrarily re-coding negative observations as a small number between zero and one, and leaving positive observations unchanged, and then logging the altered series. But to add a constant to some but not all observations in a series is methodologically unsound, and the better approach is to add a "start", equal to some value just greater than the absolute value of the most extreme negative observation, to *all* of the observations in the series, and then to log the uniformly shifted series. That is the approach taken here.

§4.3 The Basic Replication Model—Independent Variables

Neumayer and Spess follow previous studies in focusing on the effect of *signed* BITs on FDI inflows, without regard for when, or whether, a given BIT has entered into force. This is conceptually difficult to justify if we view the importance of BITs as lying in their legally binding nature, because BITs, for the most part, do not legally bind state-parties until they have entered into force. Investors are unlikely to place much credible commitment weight on a BIT until it has been ratified by both parties and become legally binding. And as a practical matter, it is generally much more difficult for investors to determine whether a BIT has been signed, or what a BIT contains, until it has been ratified, entered into force, and more widely published or publicized. In the next Chapter I restrict the analysis to in-force BITs, but for the moment I follow Neumayer and Spess in constructing my principle explanatory variable by counting the cumulative number of BITs that a given host state has signed in the current year or past years. The source of Neumayer and Spess's BIT "count" is unclear, but it appears as if they relied on two UNCTAD compilations.[7] For the replication I rely on UNCTAD's list, corrected for the obvious mistakes and omissions discussed in Chapter Two and including BIT-equivalent commercial treaties. I have also extended the count of signed BITs through 2002; Neumayer and Spess count signed BITs only through 2001.

Neumayer and Spess make a cogent argument that the best practice is to weight this count by the importance of the treaty partner as a potential source of foreign capital. Thus signing a BIT with the United States should, intuitively, be worth "more" than signing a BIT with Denmark or Switzerland, because in a given year the United States supplies far more of the world's foreign investment than do these smaller countries. I follow Neumayer and Spess in weighting my count of BITs by each partner country's share of world FDI outflows, which I calculate as a five-year moving average. The BIT variable is in proportion form. This means, for example, that a BIT with the United States in 1985 would be worth approximately 0.25, corresponding to the United States' 25% share of world FDI outflows in that

and surrounding years, while a BIT with France would be worth approximately 0.05, corresponding to that country's share of FDI outflows of 5%. For a developing country that has signed a BIT with both the United States and France, and with no other capital exporting country, the value of its BIT variable would be 0.30.

Neumayer and Spess include in their counts of signed BITs only those BITs between developing and OECD countries, with membership in the OECD standing in as a proxy for a country's status as a major source of investment capital. As the OECD now contains a number of not-quite-developed countries, such as Mexico, the Slovak Republic, and Turkey, as well as recently-developed countries that provide little in the way of foreign capital, such as Ireland, Greece, Portugal, and Turkey, a more theoretically defensible strategy is to actually identify those countries that have historically tended to provide the lion's share of FDI, and to "count" only BITs that involve one of those countries. I take that latter strategy here, using the same methodology described in Chapter Two. This selection strategy has the effect of adding a number of wealthier countries, such as Ireland, Greece, and Portugal, which are excluded from Neumayer and Spess's analysis and whose FDI inflows Neumayer and Spess do not attempt to explain. But in justification of these countries' inclusion in the sample, let me note that until recently these additional countries were generally considered to be "developing" as well, that today the economies of many "developing" countries, like South Korea, are as "developed" as those of countries like Greece and Portugal, and that the best means of accounting for differences in levels of development is to directly control for those differences in the regression equation (as I do below), and not by excluding countries that take extreme values on a particular variable of analytical relevance.

Neumayer and Spess include in their models a small number of largely uncontroversial economic control variables. It is often argued in economic and political-economic studies of FDI flows that foreign investors are particularly attracted to large, rich, and growing markets. Neumayer and Spess accordingly control for population (a measure of market size), per capital GDP (a measure of market wealth), and

economic (GDP) growth rates. They also control for inflation, which serves as a proxy for "macroeconomic stability," and for openness to trade, which they proxy through variables indicating membership in the World Trade Organization (WTO) or free trade agreements (FTAs). Because I include membership in BIT-like FTAs in my BIT count variable, I follow a somewhat different (but very common) approach in measuring trade openness. Using Gleditsch's "Expanded Trade and GDP" database,[8] I construct a "trade openness" variable measuring the value of each country's imports and exports divided by GDP. Higher values indicate greater openness to trade. Finally, Neumayer and Spess control for the "intensity" of a country's current exploitation of natural resources, arguing that "intense" exploitation attracts FDI. I argue in Section IV that the more appropriate measure is one of exploitable natural resource *stocks*, and that these stocks are largely time-invariant and not thus not appropriate to include in analyses, like Neumayer and Spess's, that separately control for country-specific, time-invariant "fixed effects." But for the moment I follow their example and include their "intensity" measure, as estimated by the World Bank.[9]

The most original aspect of Neumayer and Spess's model is their assertion that BITs can be expected to have conditional effects on FDI—conditional, that is, on the pre-existing propensity or ability of a given host state to keep its (presumably favorable) promises to investors. Where, for instance, a state's political institutions are rife with "veto points" that make policy change difficult, investors may view the risk of such change to be relatively slight, and the extra security that a BIT provides might be viewed as so much icing on an already adequately iced cake—desirable, perhaps, but by no means of decisive import.

Neumayer and Spess model this conditional relationship in the standard way, by including in their models an interaction term that multiplies their count of signed BITs against any of a number of different measures of what might, in very loose shorthand, be called "political risk."

Their model takes the following basic form:

$$y = x + z + x*z + \textit{control variables},$$

where y is FDI inflows, x is the weighted BIT count, z is a measure of political risk, and $x*z$ is the multiplicative product of the first two variables. Neumayer and Spess run models using either of two alternative classes of measures of political risk: an objective measure of institutional "political constraints" or "veto points" developed by Henisz,[10] and a subjective measure produced by the International Country Risk Group (ICRG) that is based on expert surveys.[11]

In Neumayer and Spess's analysis, Henisz's measure of political constraints is systematically insignificant. I have replaced the Henisz measure with a very similar measure of institutional "veto points" produced by the World Bank, where higher numbers of veto points suggest greater policy stability due to the ability of veto players to block policy change. Neumayer and Spess also report (generally successful) results using the ICRG "composite" measure of political risk that includes subcomponents measuring expert perceptions of "investment" risk, "government stability", and "law and order."[12] I accordingly rely principally on this measure of political risk in the analyses below.

To correctly interpret the various regression outputs it is important to keep in mind that higher ratings on the ICRG measure indicate *lower* degrees of risk, just as higher numbers of veto points are also said to indicate greater policy stability. It is also worth noting that the veto point and ICRG measures of political risk appear to be tapping rather different underlying phenomena. The two measures share a bivariate correlation coefficient of only 0.17. It will thus not be surprising to see that results vary significantly between the two measures.

§ 4.4 The Basic Replication Model—Results

Table 4.1 summarizes Neumayer and Spess's main empirical findings. Using the ICRG risk variable, Neumayer and Spess find that their measures of the weighted number of signed BITs and of political risk are consistently significant and positive, while the multiplicative interaction of these two variables is consistently significant and negative.

Table 4.1: Summary of Neumayer & Spess Main Results

Variable	*Result*	*Implication*
Weighted Signed # BITs	Significant & +	More BITs→More FDI when Political Risk Rating = Zero (e.g. When Risk is High)
"Political Risk" Rating	Significant & +	Higher Risk Rating (Less Risk)→More FDI when BIT Count = Zero
"Political Risk" * # BITs	Significant & –	Less Risk → Less Effect of BITs on FDI

What are the implications? Interpreting regression results involving interaction effects poses certain complexities that are discussed in more detail below. But in brief, the authors claim to have uncovered strong evidence that BITs and political risk have a conditional relationship on FDI inflows. BITs positively impact FDI inflows, but that positive effect declines as political risk ratings increase (and thus as political risk decreases). Moreover, the apparent size of the effects of BITs on FDI is quite impressive. Neumayer and Spess report that their results imply that a one-standard-deviation increase in their BIT variable "is predicted to increase its FDI inflow by 43.7% and 93.2%."[13]

Table 4.2 reports results from my replication of their analysis. The model specifications are quite similar to Neumayer and Spess's, although I have corrected the count of signed BITs (as detailed in the previous Chapter). I have also used a different strategy of identifying "capital-exporting countries." Neumayer and Spess identify capital-exporting countries on the basis of membership in the OECD. As described in the previous Chapter, I use historical trends in actual FDI outflows to identify the top eighteen capital-exporting countries. Finally, Neumayer and Spess control for trade openness by

including dummy variables indicating membership in a free trade agreement (FTA) or the WTO. I have replaced Neumayer and Spess's FTA and WTO dummy variables with a standard measure of trade openness because my count of BITs already contains BIT-equivalent FTAs. The time period of my study also varies slightly from Neumayer and Spess's study. Depending on the specification, my replication covers the years 1976-2001 or 1985-2002. Neumayer and Spess's analysis covers the periods 1970-2001 and 1985-2001. Following Neumayer and Spess, I estimate the models presented in Table 4.2 using generalized least squares (GLS) with mean-averaged fixed (country) effects and robust standard errors.[14]

Table 4.2: Replicating Neumayer and Spess (Net FDI Inflows in Constant Dollars & Net FDI Inflows as Percent of Total World Inflows)

	I (Constant $)	II (Constant $)	III (% World)	IV (% World)
Weighted # Signed BITs	0.030 (0.58)	-0.019 (0.22)	0.021 (0.81)	0.081 (2.63)**
Institutional Veto Points	-0.011 (2.71)**	-	0.004 (2.01)*	-
BITs*Veto Points	0.032 (3.09)**	-	-0.003 (0.76)	-
ICRG Political Risk	-	-0.007 (3.343)**	-	-0.000 (0.58)
BITs*ICRG Pol'l Risk	-	0.009 (2.08)*	-	-0.003 (2.10)*
Log per capita GDP	0.182 (5.05)**	0.392 (6.55)**	0.020 (0.95)	0.062 (2.88)**
Log Population	-0.210 (2.82)**	-0.231 (3.10)**	-0.029 (1.42)	-0.015 (1.10)
GDP Growth	-0.001 (1.50)	-0.000 (0.06)	-0.000 (0.43)	0.001 (3.07)**
Inflation	-0.000 (3.10)**	-0.000 (3.28)**	-0.000 (2.31)*	-0.000 (1.89)
Natural Resource Rents	-0.004 (1.18)	-0.001 (1.22)	-0.000 (0.22)	0.000 (0.64)
Trade Openness	0.000 (2.77)**	0.000 (0.88)	0.000 (0.77)	-0.000 (0.16)
Observations	*2431*	*1581*	*2431*	*1581*
Countries	*130*	*108*	*130*	*108*
Period	*1976-2001*	*1985-2002*	*1976-2001*	*1985-2002*
R-Squared (within)	*0.16*	*0.27*	*0.01*	*0.04*

Notes: Regressions estimated using GLS with fixed effects with robust (non-clustered) standard errors. Absolute t-values are reported in parentheses. Models I and II include year dummy variables (results omitted). Each independent variable is lagged one period. * and ** indicate significance at the $\leq$ 0.05 and 0.01 levels respectively.

The dependent variable in Models I and II is logged net FDI inflows measured in constant U.S. dollars. This dependent variable represents the absolute net amount of FDI that a country receives in a given year, with amounts comparable across years. The dependent variable in the second two models is logged net FDI inflows as a percent of total world inflows. This dependent variable is reasonably viewed as representing a country's relative performance in the "competition" for FDI.

We are not terribly interested in interpreting the performance of the economic variables, except so far as to note that the results are roughly analogous to what Neumayer and Spess report. Wealthier markets (as measured by per capita GDP) appear, depending on the model specification, to attract more FDI, while larger markets (as measured by population) counter-intuitively appear to receive less, at least in Models I and II. This latter result, while surprising, is consistent with Neumayer and Spess's results. Inflation is negatively associated with FDI inflows in all four models, suggesting that stable and effective monetary policy environments are important to foreign investors. The trade openness and natural resource measures are largely insignificant predictors of FDI. This insignificance is not necessarily surprising, because the effects of trade openness and natural resource endowments on net FDI flows are theoretically ambiguous.

Take trade openness first. On the one hand, it is clear that high trade barriers can induce market-seeking FDI by encouraging investors to "jump" over high import tariffs by establishing production facilities in-country. The archetypal example is the Brazilian automobile industry. In the 1960s, the Brazilian government explicitly sought to persuade foreign auto manufacturers to locate production facilities in Brazil by raising tariffs on automobile imports to prohibitive levels.[15] On the other hand, a reduction in trade barriers, which would discourage tariff-jumping FDI, might be expected to encourage export-oriented FDI by making it cheaper for the foreign-based manufacturer to obtain production inputs from the least-cost supplier rather than from the host state.[16] It is impossible to model these differential and potentially off-setting effects of trade openness with the relatively crude empirical measures of FDI and of trade openness that are at hand.

As to natural resources, Neumayer and Spess, among others, suggest that countries with large stocks of natural resources will naturally attract more FDI than countries with poorer endowments.[17] This is in some respects a very reasonable assumption, because it is undeniable that certain kinds of investors (e.g. those that seek access to and control over natural resources) will understandably seek to

operate in localities where such resources are most readily available in the desired quantities. On the other hand, at least since the mid-1970s natural-resource-oriented FDI has accounted for a small and declining proportion of total world FDI flows.[18] This suggests that even if abundant natural resources do *on net* increase FDI inflows, the effects are not likely to be very large or significant. The italics around the words *on net* serve to flag a more serious problem—the possibility that abundant natural resources may increase natural resource-oriented FDI inflows while *decreasing* a country's attractiveness as a destination for other kinds of FDI. If the latter effect swamps the former, we might reasonably expect abundant natural resource endowments to decrease overall FDI inflows. This may be the case, for instance, if natural resource-abundant countries are systematically "cursed" with poor economic performance or weak institutions that drive away FDI in other sectors.[19] In any event, the natural resource intensity variable is insignificant in all models, suggesting that the contradictory theoretical effects of the variable on net FDI inflows tend to cancel each other out in practice.

The coefficients and significance of the BIT and political risk variables are also not of much inherent interest. This is because interpreting regression coefficients in the presence of a multiplicative interaction term poses certain subtleties.[20] In particular, the coefficient on a component of an interaction term (here, the BIT or political risk variables) indicates *only the effect of that component when the other component is equal to zero.*[21] Unlike coefficients on variables in models that do not include interaction terms, the coefficients on the components do not indicate some sort of general or average relationship between the component and the dependent variable. In cases where the value of one component never equals zero in the "real world", the significance of the components is especially meaningless. For example, our World Bank measure of institutional veto points *never* equals zero. Neither does the ICRG variable. A "finding" that the BIT component of a BIT-Political Risk interaction is significant thus tells us absolutely nothing of practical interest, because we will never observe a country that has zero political risk under either measure.

We are not even particularly interested in whether the interaction term is significant in the standard regression output. While the sign on the interaction term indicates the direction of the conditional relationship (so that a negative sign means that the effect of one component of the interaction term declines as the value of the other component increases, and vice versa), it is far more meaningful to calculate the significance and magnitude of *the marginal effects* of changes of the value of one component of the interaction term on the dependent variable across various values of the other component. I do this in Figures 4.1 through 4.2, below, following the approach described and advocated by Brambor et al.[22] The Figures illustrate the marginal effects of signing additional (weighted) BIT's on FDI inflows at varying levels of political risk, with FDI inflows measured in either logged absolute real dollars or as a logged share of world FDI inflows, and political risk modeled either as "veto points" or using the ICRG composite measure. The marginal effects of the BIT variable are displayed along the *y*-axis, while the observed levels of political risk are displayed across the *x*-axis. The diagonal solid line represents the point estimate of the marginal effects, while the dotted lines around the marginal effects line illustrate the 95% confidence interval of the point estimation.[23] The solid horizontal line is the x-axis at zero ("the zero line"). Where both the upper and lower bounds of the confidence interval are positive (above the zero line) or negative (below the zero line) the effect of BITs on FDI inflows is statistically significant in the direction indicated by the point estimate. Where the confidence interval straddles the zero line, we cannot reliably say whether or not BITs have positive or negative effects on FDI.

Figures 4.1 and 4.2, directly below, correspond to Models I and II in Table 4.2. The dependent variable in both cases is logged FDI inflows in absolute real dollars. In Figure 4.1 we see that the weighted number of signed BITs has a consistently and reliably positive effect on FDI (as the confidence intervals are almost everywhere above the zero line), and that this positive effect increases in magnitude as the number of veto points increases and thus, presumably, as the level of policy stability increases as well. The effect of BITs on FDI can be impressive. At the highest levels of political risk, the BIT variable has a coefficient of nearly 0.6, suggesting a nearly 60 percent increase in FDI inflows. This

indicates that BITs have a statistically significant positive effect on FDI across the range of observed values, even if the rather wide confidence intervals suggest that the particular point estimates may not be all that precise at the highest levels of veto points.

Figure 4.1: Marginal Effect of Signed BITs on FDI as Political Risk Changes, Neumayer & Spess Replication

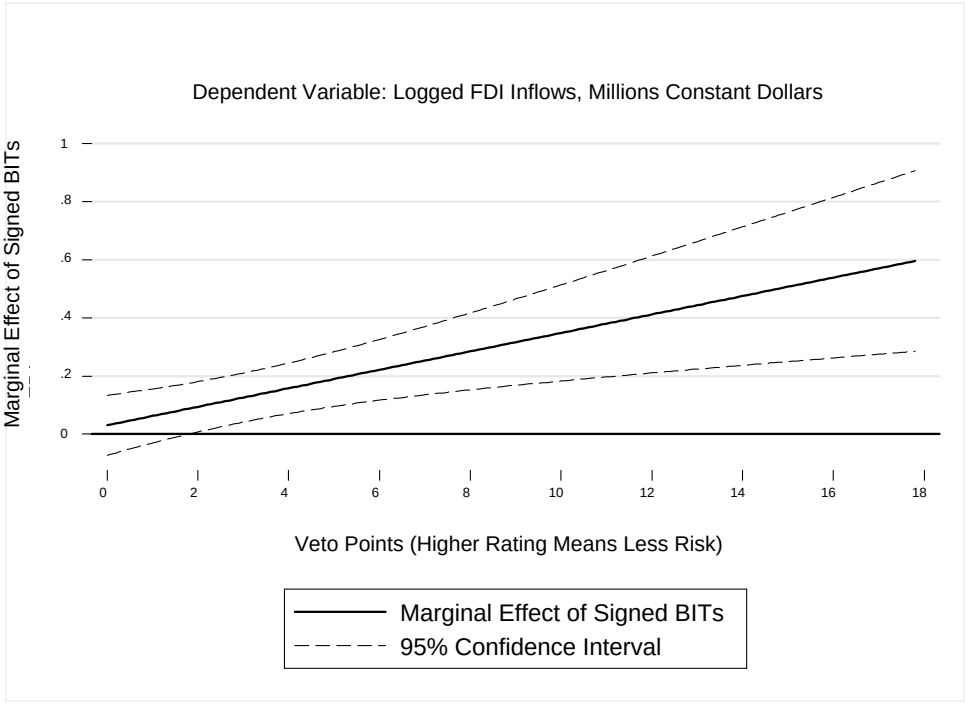


Figure 4.2: Marginal Effect of Signed BITs on FDI as Political Risk Changes, Neumayer & Spess Replication

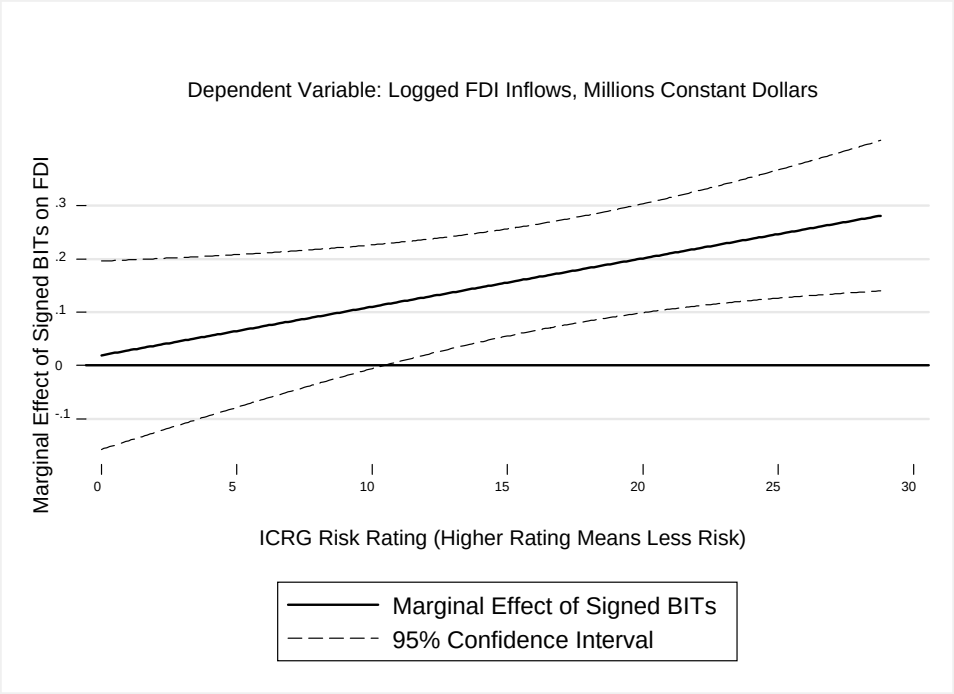


Figure 4.2 shows a similar general trend with the ICRG risk variable. BITs appear to be positively associated with FDI inflows measured in constant dollars, and the positive effect increases in magnitude as the ICRG political risk rating increases, and thus as political risk decreases. However, note that the confidence interval straddles the zero line at the lowest risk ratings; this suggests that the predicted positive effect of BITs on FDI is not statistically significant for those riskiest countries. But for the least risky countries, such as those enjoying risk ratings above 20 on the ICRG scale, the effects of BITs on FDI inflows are again impressive. The point estimates suggest that in these cases the marginal effect is equivalent to an increase in FDI inflows ranging between twenty and thirty percent.

But from the perspective of Neumayer and Spess's conditional theory of the effect of BITs on FDI, the problem should be immediately obvious. In Figures 4.1 and 4.2 the conditional relationship is

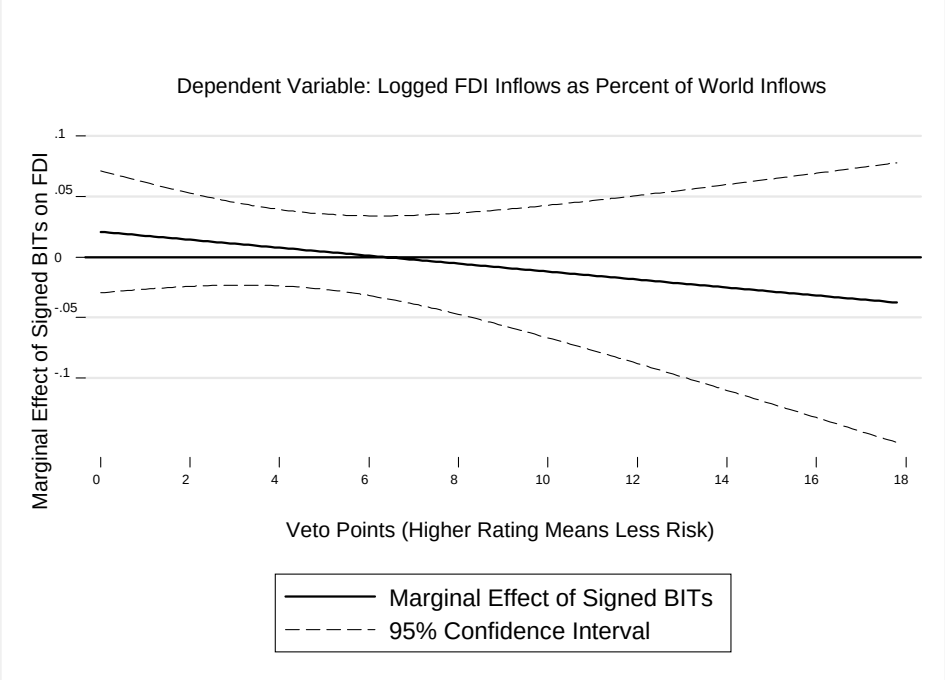
precisely *opposite* to that which we would expect. As risk decreases, BITs become *more* effective. I will refrain from attempting to offer much in the way of substantive explanation for this counterintuitive conditional relationship, except to note that there is little direct empirical evidence that "veto points" are meaningfully related to the underlying concept that they are supposed to tap: investors' subjective perceptions of the likelihood that government policy will remain stable. Measuring such perceptions is difficult, but BERI, a well-known private risk-rating agency, has produced an expert-survey measure of perceived "policy continuity" for a moderate number of developed and developing countries since 1980. Higher ratings on the BERI policy continuity measure indicate a lower risk of policy change. For the 33 countries that are both in my sample and covered by the BERI measure, the Polity IV and BERI measures have a correlation coefficient of only -0.17. The coefficient is statistically insignificant (at the 0.11 level), and in any event if it were significant the negative sign would suggest that investor perceptions of the risk of policy change *increase* as veto points increase. Given theoretical expectations of a positive association between policy continuity and veto points, this is a quite troublesome relationship. At the least, it suggests that the seemingly strange conditional relationship between BITs and veto points evidenced in Figure 4.1 is potentially due to a severe mismatch between what the veto points variable represents in theory and what it actually measures in practice.

Why the ICRG model also fails is a more difficult question to answer. Let me suggest more broadly that it is worth considering whether including a multiplicative interaction term is worth the theoretical candle. Standard hierarchical F-tests, which can be used to test whether an interaction effect meaningfully "exists" in the statistical sense, do indicate that the interaction effects illustrated in Figures 4.1 and 4.2 are statistically meaningful. This is unsurprising, given the large number of degrees of freedom in the models. More relevant for present purposes is that including interaction terms explains such a small amount of additional variance that, as a practical matter, it matters little overall whether an interaction term is or is not included. For example, the "within" r-squared for the model illustrated in Figure 4.1 increases from 0.1591 to 0.1619 with the inclusion of the interaction effect; for the model

illustrated in Figure 4.2, the "within" r-squared increases only from 0.2677 to 0.2701. These meager increases suggest the potential wisdom of abandoning the interpretive complexities that interaction effects tend to involve in favor of a simpler additive model approach.

But putting that issue aside, let us return to the replication results, and in particular to Table 4.2 Models III and IV, which report results from the replication model using each country's logged percent share of world FDI inflows. This, recall, is our measure of a country's position in the "competition for capital." The key result to note is that the interaction terms are now negatively signed, as they were in Neumayer and Spess's analysis. This suggests a confirmation of their hypothesized conditional relationship: as political risk ratings increase (and political risk declines), BITs should become *less* effective at inducing FDI inflows. Figures 4.3 and 4.4 illustrate just such a pattern: as political risk decreases (e.g. as veto points increase, or as the ICRG risk rating increases), the marginal effect of BITs on FDI share decreases.

Figure 4.3: Marginal Effect of Signed BITs on FDI as Political Risk Changes, Neumayer & Spess Replication

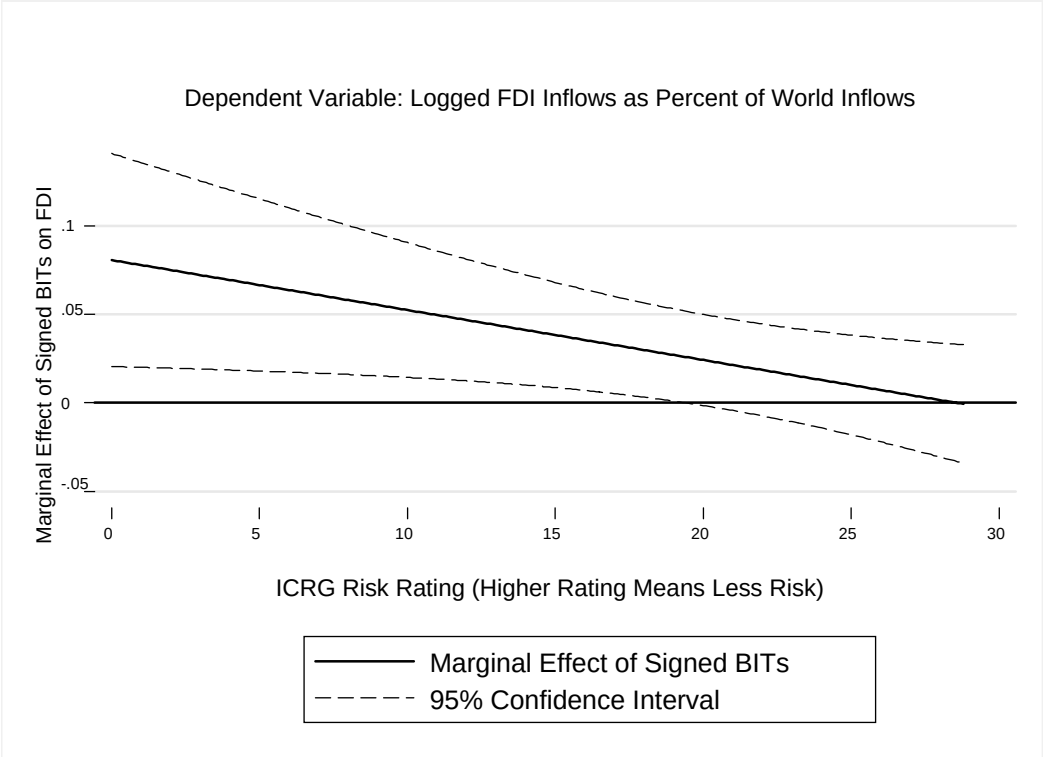


The problem in Figure 4.3 is not difficult to spot. The Figure shows that when the institutional veto points variable is our measure of political risk, the marginal effect of BITs on political risk is statistically insignificant at all levels of veto points. The failure of the veto points model is most likely a result of the poor match between the concept and what it is supposed to measure. As we have seen above, a country's number of veto points has little relation to investors' perceptions of policy stability.

Figure 4.4, below, presents more encouraging findings. Here we see that BITs have their greatest (positive) effect on FDI share at high levels of risk (and thus at low ICRG ratings), and that the effect declines, eventually reaching zero, as risk decreases. Here we have, then, relatively strong confirmation of Neumayer and Spess's theory and findings, with one caveat: note that the direction of the marginal effects is statistically insignificant where the ICRG risk rating exceeds approximately 20, as the confidence interval begins to span the zero line. In more practical terms this means that for roughly thirty percent of the countries in our sample BITs do not have a statistically significant positive effect on FDI share.[24] Perhaps more discouragingly, even where the effect is reliably positive, it is not necessarily of great substantive magnitude. For example, at our sample-observed minimum ICRG risk rating of 2.4, the marginal effect of BITs on FDI is approximately 0.075. Because the model is log-linear (with a logged dependent variable and non-logged independent variables) this suggests that a one-unit change in the weighted BIT variable can be expected to result in a 7.5 percent change in a country's FDI share. For example, if a developing country has a current world FDI share of 0.20 percent (roughly the mean in our sample), the marginal effect of a one-unit change in the BIT variable suggests an increase in share from 0.20 percent to 0.2015 percent. We can easily translate this hypothetical increase into absolute dollar values. In 1985 world FDI inflows totaled approximately $55,000 million, in current dollars. An increase in share from 0.20 to 0.2015 suggests an increase in FDI inflows from $110 million to $110.825 million—only 825,000 *thousand* dollars. To put that amount in further (diminished) perspective, recall that the BIT variable is a proportion, so that signing a BIT with a particular capital exporting country will necessarily

lead to a change in the *BIT variable* of far less than a "unit." Take France, for example, which regularly provides roughly five percent of world FDI outflows. Figure 3D suggests that for our hypothetical high-risk country, which at the present enjoys an FDI share of 0.20 percent, signing a BIT with France would be expected to lead to a marginal increase in FDI flows of only only (0.05 * $825,000)—just $41,000.

Figure 4.4: Marginal Effect of Signed BITs on FDI as Political Risk Changes



§4.5 Sensitivity of the Basic Replication Model

It is helpful to summarize the results of the replication exercise up to this point. First, we have found very inconsistent evidence in support of Neumayer and Spess's conditional theory of the effects of BITs on FDI. In three of the four replication models, the conditional relationship was either wholly insignificant (in the sense of straddling the zero-line in our figures) or the opposite of what we would theoretically expect. On the other hand, we have produced some evidence that BITs might matter, statistically and positively speaking, in terms of attracting FDI. Figures 4.1, 4.2, and 4.4 all suggest some

degree of a significant, positive relationship between BITs and FDI. Of the four models, Table II, Model IV (illustrated in Figure 4.4) performs the most successfully. BITs appear to have a positive, significant effect on FDI share across all observed levels of political risk, and that relationship is conditional in the expected direction. However, recall that the size of the marginal effects of BITs on FDI share is much smaller than Neumayer and Spess report. Indeed, it is so small to be of questionable substantive relevance. It is probably safe to assume that the costs of signing a BIT in terms of litigation risk, policy inflexibility and the like would surely outweigh so small a benefit in additional capital.

The replication is, in other words, neither a complete failure nor a smashing success. In this subsection I examine how well the best-performing model—Model IV—holds up to five important but very justifiable changes in specification and estimating strategy:

- correcting standard errors for country-level correlation by "clustering";
- de-logging the dependent variable;
- estimating the model using panel-corrected standard errors and a lagged dependent variable;
- re-specifying the interaction term to take into account the worldwide number of BITs in force;
- disaggregating the BIT variable to take into account differences in dispute settlement provisions.

My results are not encouraging. In most cases the changes either substantively alter the direction of key relationships or render those relationships statistically insignificant.

Sensitivity to Clustering. The error terms in time-series cross-section (TSCS) analysis (i.e. analysis of the type performed here) are often correlated within classes or groups of observations. As Williams explains,

> There are many situations where data are observed in clusters such that observations within a cluster are correlated while between clusters are uncorrelated, so-called cluster-

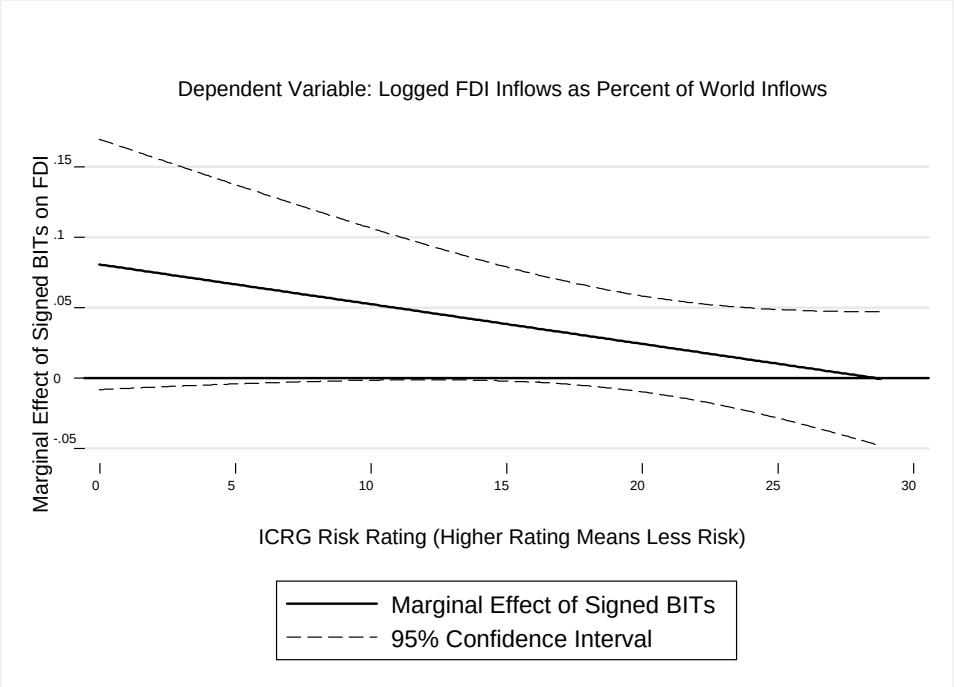
> correlated data. For example, the typical teratology screening experiment involves administration of a compound to pregnant dams of a rodent species, followed by evaluation of the fetuses in a litter for various types of malformations. In this situation, the fetuses within a particular litter are correlated while any two fetuses from different litters are independent….
>
> …
>
> A major statistical problem with cluster-correlated data arises from intracluster correlation, or the potential for clustermates to respond similarly. This phenomenon is often referred to as overdispersion or extra variation in an estimated statistic beyond what would be expected under independence. *Analyses that assume independence will generally underestimate the true variance and lead to test statistics with inflated Type I errors.*[25]

In other words, where within-group correlations are high, we can expect tests of statistical significance to be biased toward unjustifiably rejecting the null hypothesis of no statistically significant relationship. The danger is such that applied econometricians increasingly recognize that controlling for intra-class correlations is an "essential need…in estimating standard errors of regression parameter estimates."[26] Cluster-robust standard errors are widely used in sample-survey research to correct the problem. The technique is easily extended to other kinds of analyses, it is perfectly compatible with the simultaneous conclusion of group fixed effects or group dummy variables, and there is nothing inappropriate about including in a given model country fixed effects while at the same time also controlling for within-country variance correlation through clustering. Fixed effects are usually employed solely to control for potential omitted-variable bias affecting the estimated coefficients. Clustering addresses the entirely different problem of within-group correlation of variance, and it "works", in most cases, by adjusting standard errors upward. Clustering will not affect coefficient estimates, while including fixed effects nearly always will.[27]

Here, evidence suggests that clustering is indeed desirable. Within-group correlation coefficients, calculated using one-way random-effects ANOVA techniques, are remarkably high.[28] For our measure of (logged) FDI share the intra-class correlation coefficients are 0.31 and 0.68, depending on whether the sample is defined by the veto points or ICRG political risk variables. In either case, the coefficient is extremely high, and clustering is probably warranted.

Figure 4.5 illustrates the statistical effects of clustering on the most successful replication model. We see that clustering did not affect the model's coefficients: note that the marginal effects line is identical to the line illustrated in Figure 4.4 (the equivalent unclustered analysis). But clustering *does* increase the standard errors, and hence the spread of the confidence interval. The effect is significant (in the statistical and non-statistical senses), as now the lower bound in consistently below the zero line, indicating that BITs do not have a statistically significant directional impact on FDI share at any value of political risk. In other words, the only more-or-less successful replication result that I am able to obtain in Table 4.2, Model IV is non-robust to clustering. And while I cannot say for certain whether clustering would similarly impact a precise *duplication* of Neumayer and Spess's model, it seems likely that the process would have a substantially deleterious effect on their reported results as well.

Figure 4.5: Marginal Effect of Signed BITs on FDI as Political Risk Changes, Clustered SEs

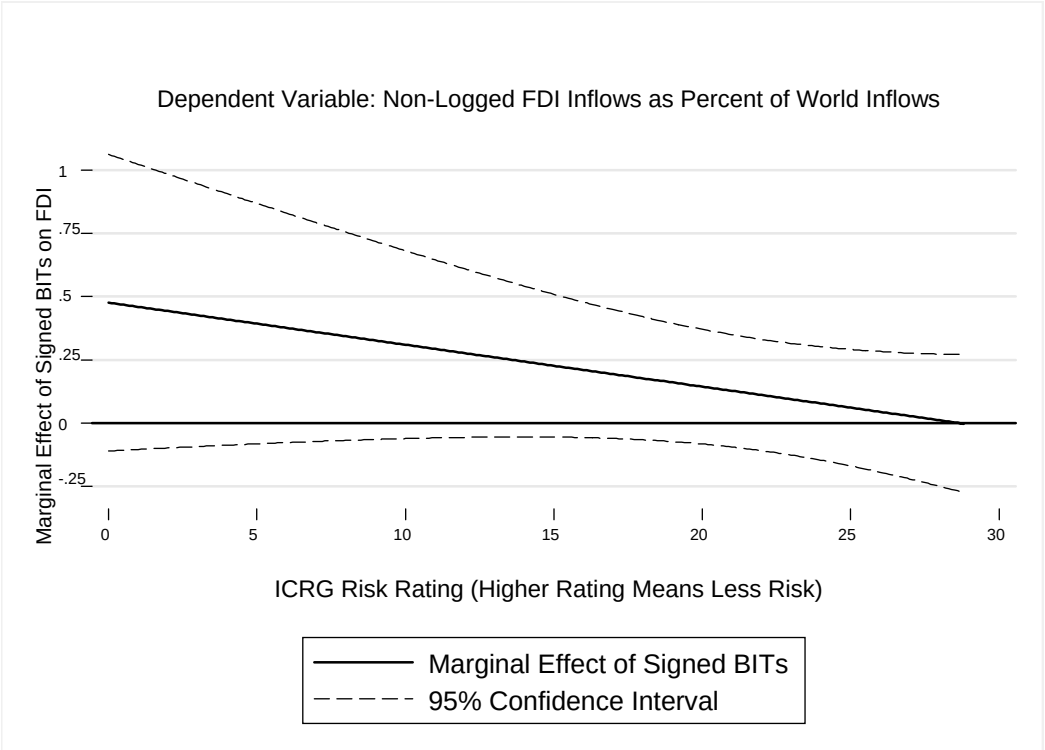


Sensitivity to Non-Transformation of the Dependent Variable. Neumayer and Spess log transform their dependent variable "to reduce the skewness of its distribution." They allow that "[t]his increases model fit substantially".[29] The proffered justification for the transformation is something of a non sequitur, as statistical theory makes no substantively relevant assumptions about the shape of the distribution of the dependent (or independent) variables. Statistical theory does demand that the residual *errors* be more or less normally distributed, and in many cases where the errors are skewed (e.g. bunched to the right or left) or exhibit kurtosis (e.g. are excessively or inadequately peaked) the values of the dependent variable will be non-normal as well. In these cases it might be acceptable to log transform the dependent variable as a way of forcing the errors to more closely approximate a normal distribution. However, non-normal distribution of the residuals becomes less of a problem as sample sizes grow larger, and in the present analysis sample sizes (of over 1500 observations) are fairly large. Furthermore, when models contain multiplicative interaction terms, as ours do, the relationship between the distribution of the dependent variable and the residuals often tends to weaken. This means that a non-normally distributed dependent variable will not necessarily indicate that the residuals are problematically non-normal, and that a "correction" of the distribution of the dependent variable will not necessarily "correct" the distribution of the residuals.

Neumayer and Spess's analytical caveat that "model fit" is improved by log transformation is also very curious, because the most important question is not whether model fit—e.g. the amount of variance explained, as measured by the model's r-squared—necessarily improves, but whether the log transformation affects the statistical significance and magnitude of the correlation between the key independent variables and the dependent variable. They provide no indication of whether or not log transformation indeed makes or breaks their principal results.

In other words, what we are really interested in is whether models with a non-logged dependent variable show problematically non-normal distributions of residual error; whether log-transforming the dependent variable substantially improves that distribution; and, finally, whether the transformation renders key relationships statistically significant where before they were not. Let us take on the first inquiry first. Figure 4.6 illustrates the marginal effects of Neumayer and Spess's weighted BIT variable on FDI share as the ICRG political risk variable varies in value. It should be immediately evident that de-logging the dependent variable renders the relationship between BITs and FDI share statistically insignificant, in the confidence-interval sense, across the entire observed range of political risk. Whether FDI share should be logged or not is thus a question upon which Neumayer and Spess's key findings necessarily hang.

Figure 4.6: Marginal Effect of Signed BITs on FDI as Political Risk Changes, Non-Logged DV



The remaining and essential question, then, is whether a log transformation is methodologically justified. In fact, it is not particularly clear that logging the dependent variable has much of an impact at

all on the distribution of the residuals. Figures 4.7 and 4.8 depict standardized normal-probability (P-P) plots of the residuals from the logged and non-logged models of FDI share, using the ICRG political risk variable. P-P plots and their close equivalents, normalized quantile distribution (Q-Q) plots, are the best way to detect non-normality and its severity. Normal-distributed residuals will cluster along the upward-sloping diagonal line in the P-P plots. Here we see that the residuals from the logged and non-logged models exhibit largely equivalent deviations from normality. A similar pattern is evident on Q-Q plots, which I do not reproduce here, but which, if anything, indicate that the residuals from the *logged* model are the relatively more problematic. Figures 4.9 and 4.10 present frequency histograms of the residuals of the logged and non-logged models. Again, the differences between the two distributions do not appear too jarring to the naked eye. Both distributions seem to exhibit relatively high degrees of kurtosis (e.g. both distributions are highly peaked), but both also appear to be relatively non-skewed.

Figure 4.7: Normal-Probability Plot of Residuals, Logged DV

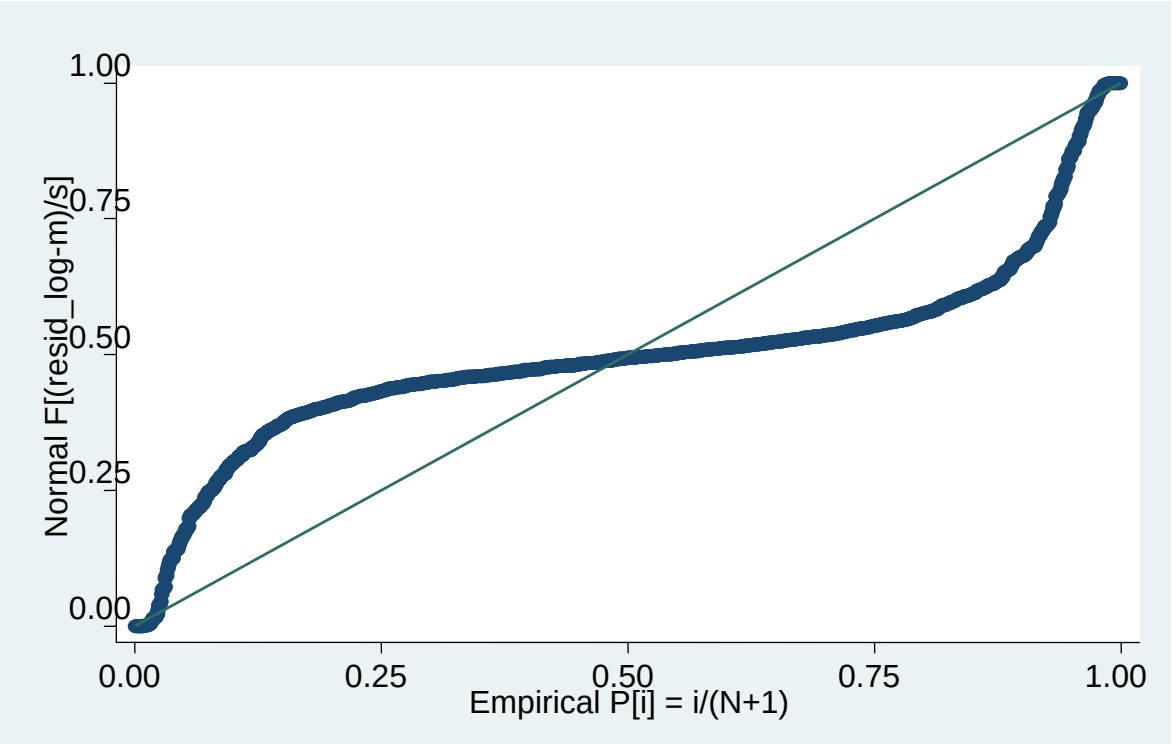


Figure 4.8: Normal-Probability Plot of Residuals, Non-Logged DV

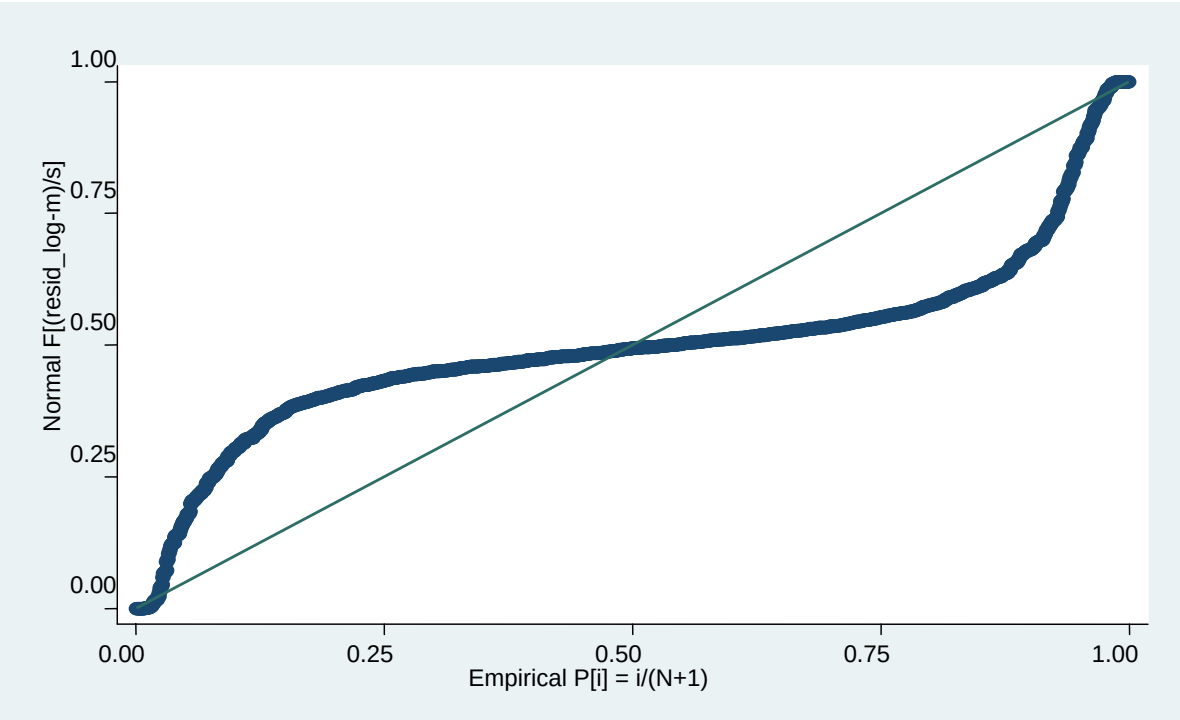


Figure 4.9: Histogram of Residuals, Logged DV

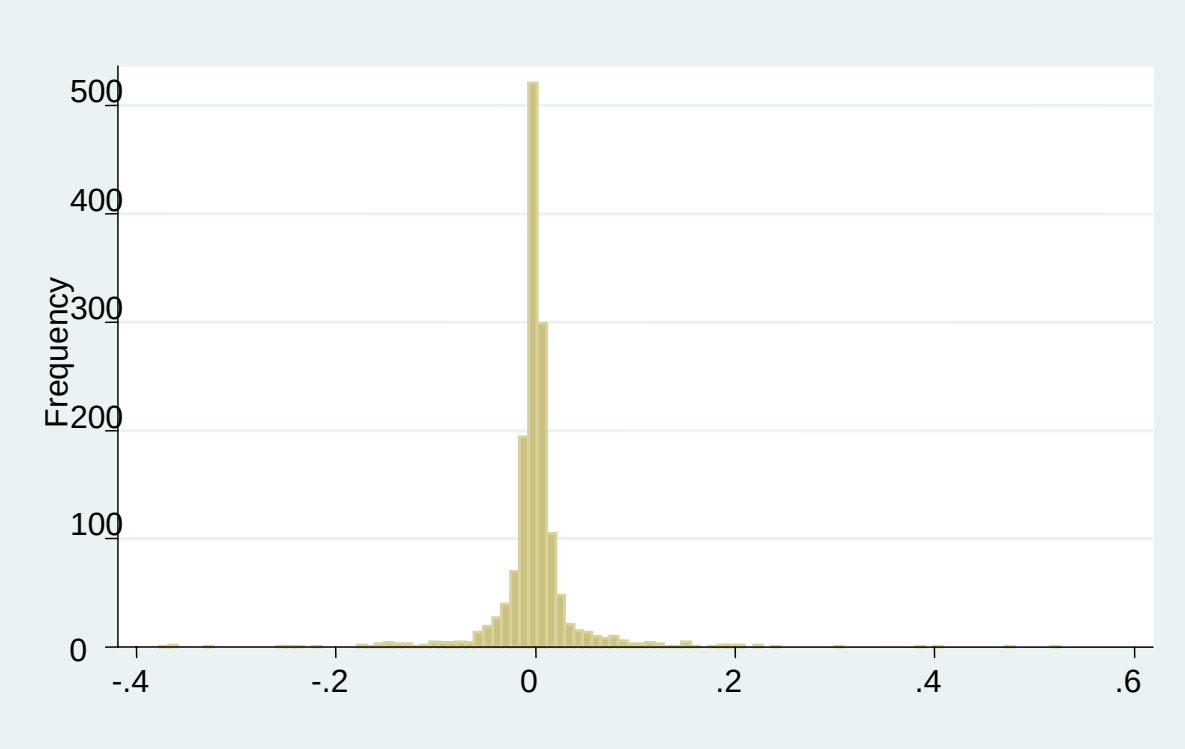
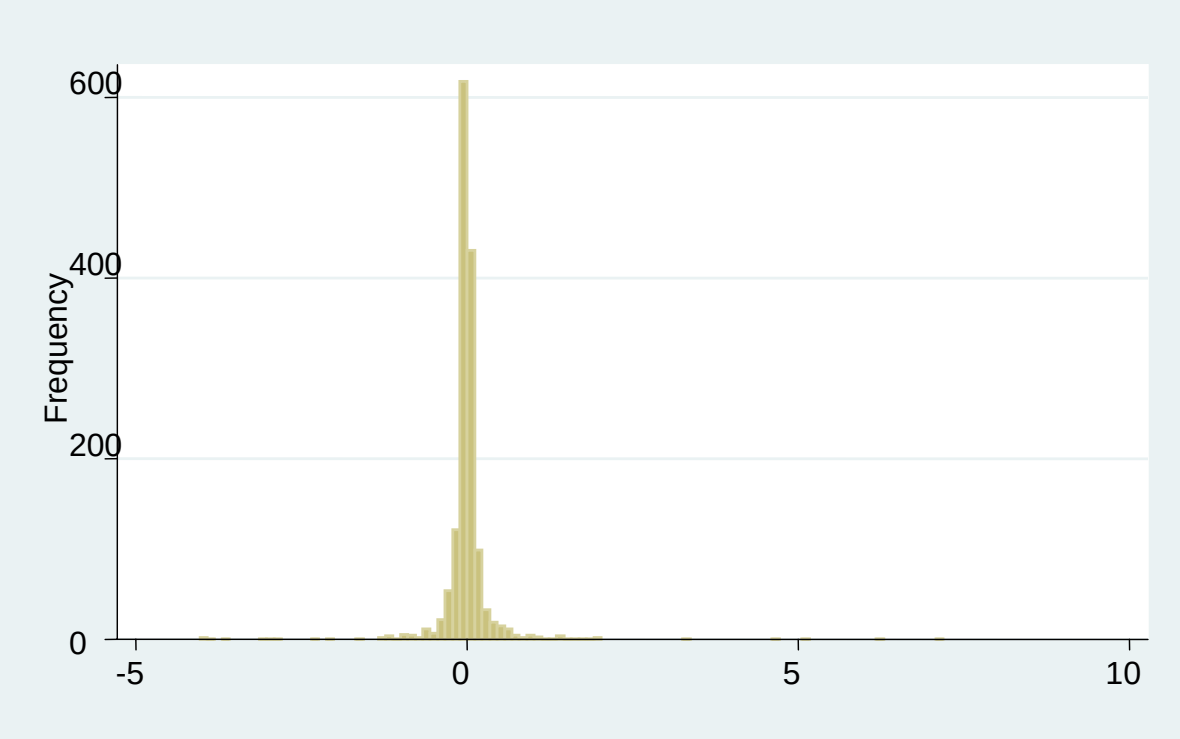


Figure 4.10: Histogram of Residuals, Non-Logged DV



It is also instructive to quantify the degree of skewness and kurtosis in the two samples. Using the standard formulas in Stata, the residuals for the non-logged model have a skewness of 3.56, indicating a slight rightward skew, and a kurtosis of 85.98, indicating that the sample is highly peaked. (Normally distributed data have a skewness of 0 and a kurtosis of 3). For the logged model, the levels of skew and kurtosis are somewhat less (1.37 and 36.70 respectively).

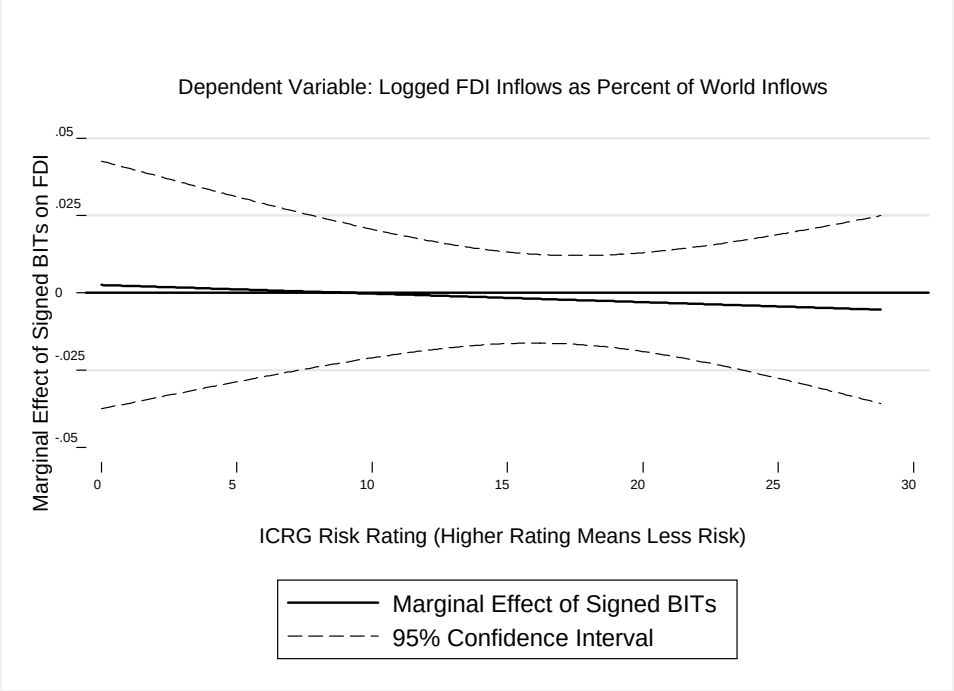
The take-away point is that logging the dependent variable somewhat improves quantitative measures of skewness and kurtosis, but these improvements are far from obvious upon visual inspection of the data. And improved or not, it is by no means clear in the first place that the degree of non-normality in the non-logged residuals is statistically problematic given the large sample size. Especially given the arithmetic difficulties in logging a dependent variable that, like ours, takes on negative values, the results of the present exercise suggest that it may be inferentially better, and certainly analytically more cautious, to avoid the log transformation absent more compelling evidence that transformation is indeed statistically necessary and meaningfully beneficial.

Sensitivity to Panel-Corrected Standard Errors with Lagged DV. In what has become one of the most-cited methodological articles in the empirical international relations literature, Beck and Katz argue that applying traditional GLS estimation methods to TSCS data can lead to "dramatic underestimates of parameter variability in common research situations."[30] In plainer terms, Beck and Katz make the theoretical case, and show empirically via Monte Carlo analysis, that GLS may lead to overconfident estimates that a given relationship is statistically significant. GLS is especially problematic where, as here, the number of time periods analyzed is less than the number of cross-sections (countries). Beck and Katz recommend estimating TSCS models using OLS and "panel-corrected standard errors" (PCSE). Elsewhere Beck and Katz recommend including in the OLS-PCSE model a lagged dependent variable (LDV), which serves to capture dynamic tendencies in the causal relationship.[31] (A dynamic relationship

exists when past values of the dependent variable are causally related to present values). Keele and Kelly have recently shown that this latter advice is usually well-taken.[32] OLS-PCSE-LDV estimation has become very common in political science,[33] and PCSEs are especially useful in dealing with panel-level heteroskedasticity, in which variances systematically differ in magnitude by cross-sectional groups. Wald tests for groupwise heteroskedasticity in the fixed-effects models reported in Table 4.2 reject the null hypothesis of groupwise homoskedasticity at the 0.0000 level, indicating that heteroskedasticity is indeed a potential problem. This provides significant evidence that PCSEs are especially appropriate.[34]

It is, in other words, well worth considering whether a change in estimation strategy from GLS to the Beck and Katz method meaningfully changes model results. In fact, and as Figure 4.11 shows, the results change quite substantially.[35] The marginal effects line is very nearly horizontal, which strongly suggests that the conditional relationship hypothesized by Neumayer and Spess is so slight as to be substantively meaningless. Just as importantly, the effect of BITs on FDI is statistically insignificant across all values of the ICRG risk variable.

Figure 4.11: Marginal Effect of Signed BITs on FDI as Political Risk Changes, PCSE



It is also worth noting that the LDV is massively significant, with a z-score of over 13 and a large, positive coefficient. This indicates that there is a strong dynamic relationship between present and past values of a country's FDI share. The significance of the LDV should not be surprising. As Keele and Kelly suggest, "[t]he preponderance of the evidence in both economics and political science is that many if not most cross-temporal processes are dynamic,"[36] and there are strong theoretical reasons to believe that the processes that generate FDI are dynamic as well. For example, in her well-researched case study of Intel's surprising selection of Costa Rica as the site for a $300 million semiconductor assembly and testing plant, Spar describes Intel's practice of consulting with existing foreign investors in Costa Rica. These interviews, upon which Intel "relied heavily," allowed Intel to "assess Costa Rica's record in delivering on its promises."[37] Spar concludes that

> Costa Rica got on Intel's list because other investors had already gone there and were beginning to spread word of the country's attractions. This follow-the-leader process supports what the data on FDI already suggest: it is highly concentrated in a handful of

> top recipient. Because companies such as Intel rely so extensively on word-of-mouth reports from existing investors, each round of investment seems to generate its own offspring, and success in attracting FDI begets success. Part of this follow-the-leader behavior may be motivated by commercial considerations: firms may follow their customers to new markets or lead suppliers along with them. But the preponderance of investment clusters suggests a more basic driver as well: firms invest in countries that already have a proven track record of attracting foreign investors and treating them well.[38]

This general idea—that foreign investors tend to invest where others have already invested—is "well established" and supported by "broad empirical evidence" in the economic literature on the determinants of foreign investment.[39] This literature suggests that any analysis of the effects of BITs on FDI inflows will necessarily need to take into account a host state's past success in attracting foreign investment, as long as the relevant data is stationary and the model is correctly specified so as to render the residuals white noise. Not surprisingly, previous empirical studies of the policy determinants of FDI inflows tend to control for the effects of past levels of inflows.[40] Given strong theory and evidence that, in the present context, the past indeed matters, models of the effects of BITs on FDI that fail to control for past values of the dependent variable are likely to suffer from serious omitted variable bias. It is thus not surprising that changing the estimation strategy from fixed effects GLS to OLS-PCSE-LDV weakens Neumayer and Spess's results substantially.

Sensitivity to Re-Specification of the Interaction Term. Though it is not typically noted, one of the most important implications of the "competition for capital" thesis, in which BITs primarily serve as a tool for developing countries to divert FDI headed to other countries into their own, is that BITs should decline in effectiveness as more and more host states conclude the treaties. To see why this is the case, consider a simple model of the "competition." Imagine four developing countries, A, B, C, and D, which are competing for a given FDI project. Imagine that the foreign investor compares the four countries along five dimensions (quality of infrastructure, policy stability, and the like) and finds that the countries are evenly matched. On the investor's checklist, each country rates a five out of five. In this situation, the investor's decision will essentially be determined by chance, and each country stands a 25

percent probability of winning the project. This is the situation represented in Column I of Table 3C, below.

Table 4.3: The BIT Game (Investor-Friendly Index / Percent Chance of Winning Investment Project)

	I	*II*	*III*	*IV*
State A	5 / 25%	6 / 100%	6 / 33%	6 / 25%
State B	5 / 25%	5 / 0%	6 / 33%	6 / 25%
State C	5 / 25%	5 / 0%	6 / 33%	6 / 25%
State D	5 / 25%	5 / 0%	5 / 0%	6 / 25%

Now imagine that it becomes feasible to sign and ratify a BIT, and that doing so would raise a country's investment rating by one. State A concludes a BIT, and its score increases to 6. State A is now a noticeably more attractive place to invest than its competitors. State A will win the project with 100 percent certainty, as indicated in Column II. Now notice what happens in Column III. Here, States B and C have followed A's lead and also entered into BITs, raising their own probability of winning the project from zero percent to 33 percent, but *lowering* A's probability of success from 100 percent to 33 percent as well. When State D finally follows suit, the developing countries are back in the same (relative) positions they were in before the BITs were feasible. Each stands an equal, 25 percent chance of winning the project.

This simple model suggests that the effects of BITs on the distribution of FDI inflows will be the greatest when BITs are few and far between. When State A is the only state bound by a BIT, it will always win competitive FDI projects given equality on all other factors that matter to investors. On the other hand, when all states are bound by BITs, the treaties have no effect on who wins a particular project. Notice that this suggests a conditional relationship rather different from that posited by Neumayer and Spess: as the worldwide number of BITs in force increases, the effectiveness of one state's own BITs at diverting FDI from other countries should decrease.

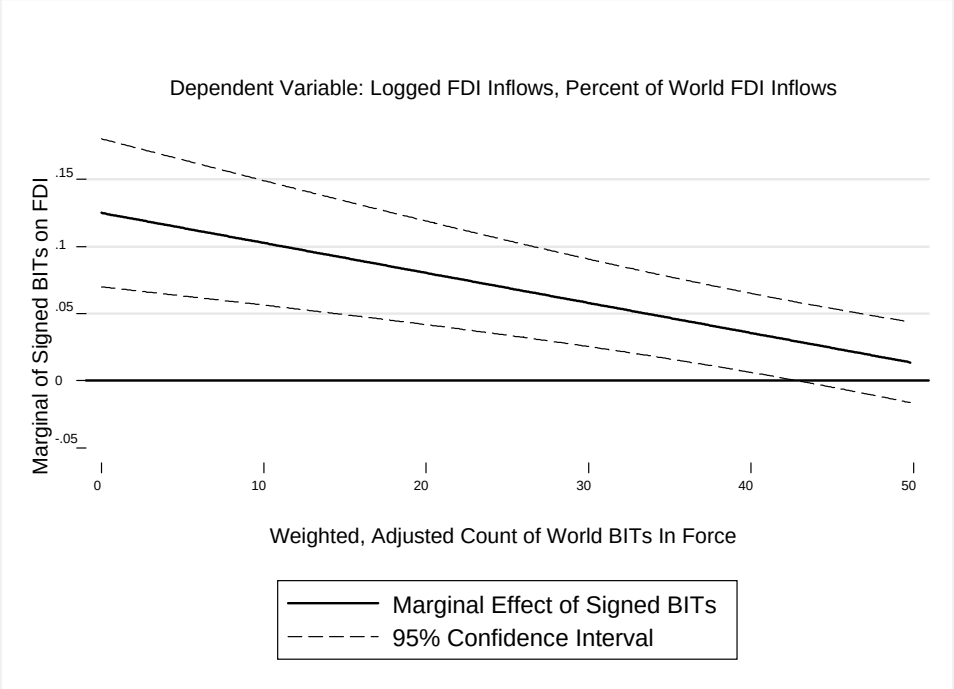
We can examine this conditional relationship in the regression context by including an appropriate multiplicative interaction term. In the Table and Figure below I interact a weighted, running count of worldwide in-force BITs with the weighted number of the host state's own signed BITs. I adjust the running count by subtracting the particular host state's number of in-force BITs from it. The models otherwise include all of the variables in the replication of Neumayer and Spess's analysis presented in Table 4.2, Model IV, including the ICRG risk variable as an additive term in the regression equation. For analytic simplicity, I do not interact the ICRG risk variable with the host-state-BIT/World-BIT interaction term, as three-way, continuous-variable interaction terms can be difficult to interpret. (However, I do present the results for a three-way interactive analysis in the following Chapter of this dissertation). I estimate the re-specified interactive model using Neumayer and Spess's preferred strategy of GLS with robust, unclustered standard errors and fixed effects, and a log-transformed dependent variable (logged percentage share of world FDI).

Table 4.4 presents the full regression output, while Figure 4.12 shows the more helpful marginal effects curve. Note that the marginal effectiveness of BITs declines as the number of worldwide BITs in force increases, just as theoretically expected. While signing BITs appears to be significantly and positively associated with greater shares of world FDI inflows when few other BITs are in force, this effect declines to near zero as BITs become more popular, just as our simple model predicts.

Table 4.4: Replicating Neumayer & Spess (Worldwide BITs)

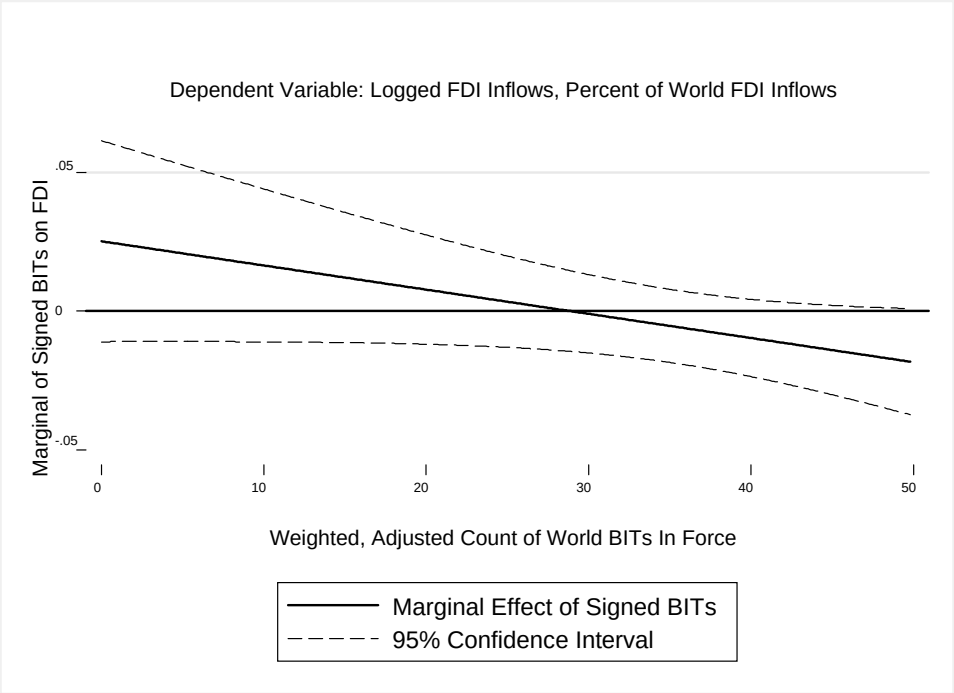
	Log FDI, % World FDI
Host's Weighted # Signed BITs	0.125 (4.44)**
Weighted, Adjusted World BITs in Force	-0.000 (0.81)
Host BITs*World BITs	-0.000 (4.05)**
ICRG Political Risk	-0.000 (0.36)
Log per capita GDP	0.080 (3.78)**
Log Population	0.023 (1.48)
GDP Growth	0.001 (2.62)**
Inflation	-0.000 (1.81)
Natural Resource Rents	0.000 (0.84)
Trade Openness	0.000 (0.62)
Observations	*1586*
Countries	*109*
Period	*1985-2002*
R^2 *(within)*	*0.06*
Notes: Regressions estimated using GLS with fixed effects with robust (non-clustered) standard errors. Absolute t-values are reported in parentheses. Each independent variable is lagged one period. * and ** indicate significance at the ≤ 0.05 and 0.01 levels respectively.	

Figure 4.12: Marginal Effect of Signed BITs on FDI as World BIT Count Changes



I should emphasize (though I don't illustrate here) that the downward-sloping direction of the conditional relationship between BITs and world BITs in force is robust to clustering of the standard errors, to de-logging the dependent variable, and to estimation using OLS-PCSE and a lagged dependent variable. Figure 4.13, below, shows the marginal effects for the OLS-PCSE-LDV model while controlling for the interactive effect of the world BIT count. We see that the number of world BITs in force substantially affects the effectiveness of signing a BIT, so much so that at current worldwide levels of BITs the point estimate of the marginal effects of BITs on FDI share is negative.

Figure 4.13: Marginal Effect of Signed BITs on FDI as World BIT Count Changes, PCSE



These results raise important doubts about the soundness of Neumayer and Spess's analysis, and also about the soundness of Elkins, Guzman, and Simmons' recent and important analysis of the diffusion of BITs. They argue that rationalistic, competitive dynamics between developing states mean that a given host state will face the greatest incentives to sign a BIT when more of its competitors have already signed BITs, and they report strong empirical support for their theory. But as the model

illustrated in Table 4.3 suggests, and as Figures 4.12 and 4.13 seem to show empirically, in a competition for capital incentives to sign a BIT are greatest precisely when *none* of one's competitors have signed a BIT. Just as importantly, those incentives decline dramatically as more states sign up to the treaties. Given that BITs impose important costs on developing countries, it seems likely that at some point, where many competitors have already signed BITs, the remaining holdouts may find that the incentives to sign BITs are actually negative—the small increase in probability of winning investment projects are outweighed by the substantial sovereignty costs of "tying oneself to the mast" of international law. Indeed, Figures 3L and 3M suggest strongly that this point has already been reached.

Sensitivity to Disaggregation of the BIT Variable. In Chapter Two I suggested that we can usefully categorize BITs according to the character (or strength) of their dispute settlement provisions. Figures 4.14 through 4.17 illustrate the impact of disaggregating the BIT variable in this way on Neumayer and Spess's basic model.

As explained in Chapter Two, the coding exercise makes it is necessary to include in the analysis only those BITs that have entered into force. This is because the texts of BITs that have been signed but have not entered into force are often difficult if not impossible for the researcher (and the foreign investor!) to obtain, making it correspondingly difficult if not impossible to code the content of the particular treaty's dispute settlement provisions.

The estimated model includes an interaction term between a weighted count variable measuring the number of each type of BIT a given host state has in force, and includes four separate product terms that multiply each BIT variable with the ICRG measure of political risk. The other control variables in the model are the same as those presented in Table 4.2, Model IV, and I again estimate the model using GLS with robust unclustered standard errors and fixed effects, and with the dependent variable in log form (Neumayer and Spess's preferred estimation strategy). The four figures thus separately illustrate the

marginal effects of each type of BIT at different levels of political risks when counts of all kinds of BITs, and their interactions with political risk, are included in a single model.

Figure 4.14: Marginal Effect of Strong BITs on FDI as Political Risk Changes

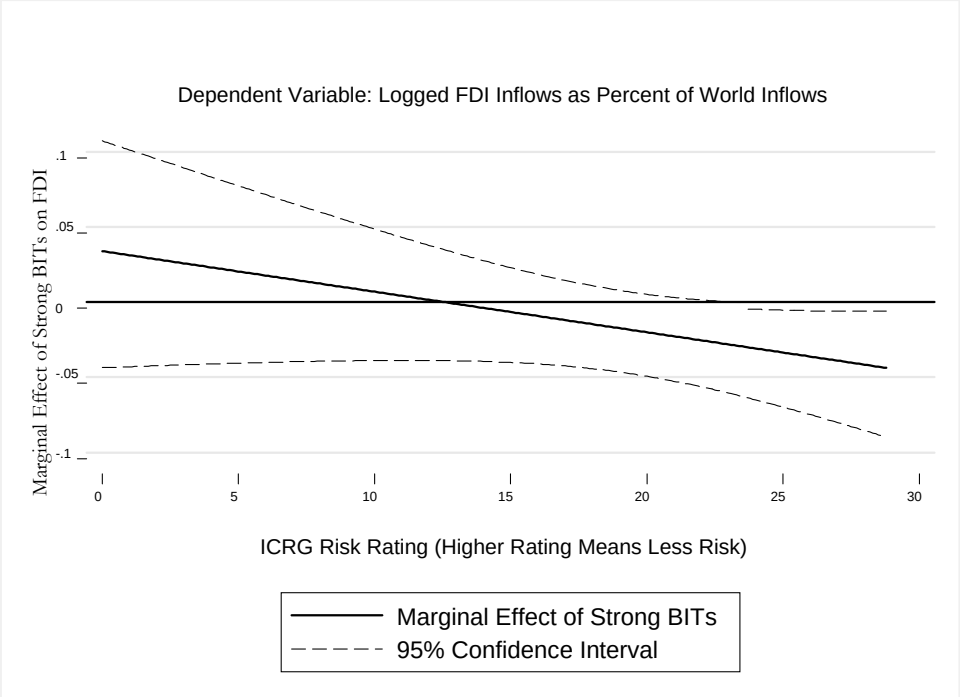


Figure 4:15: Marginal Effect of Partial Pre-Consent BITs on FDI as Political Risk Changes

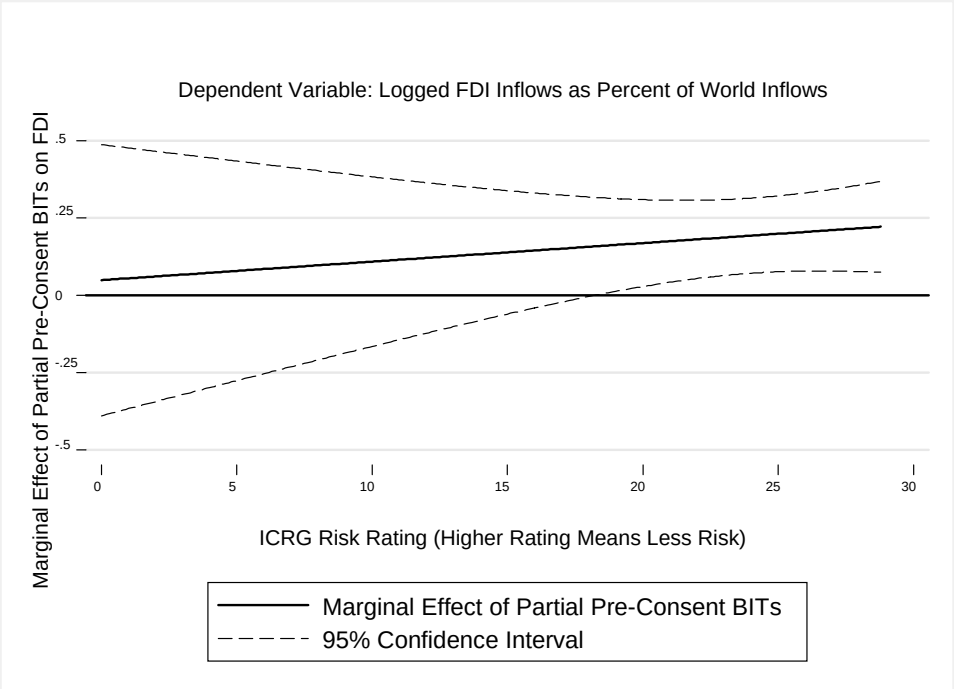


Figure 4.16: Marginal Effect of Promissory BITs on FDI as Political Risk Changes

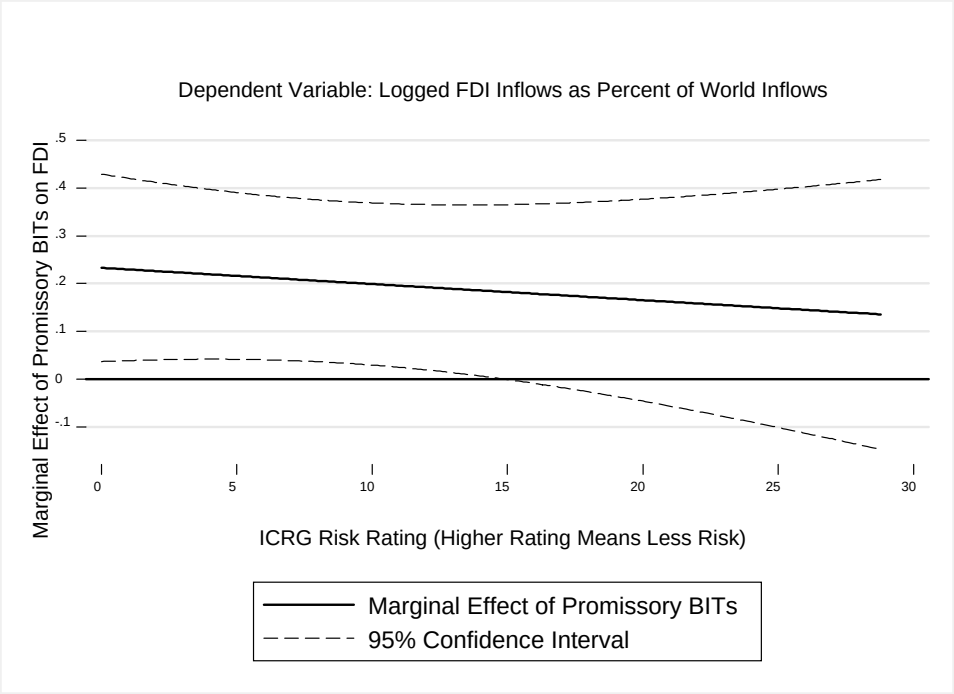
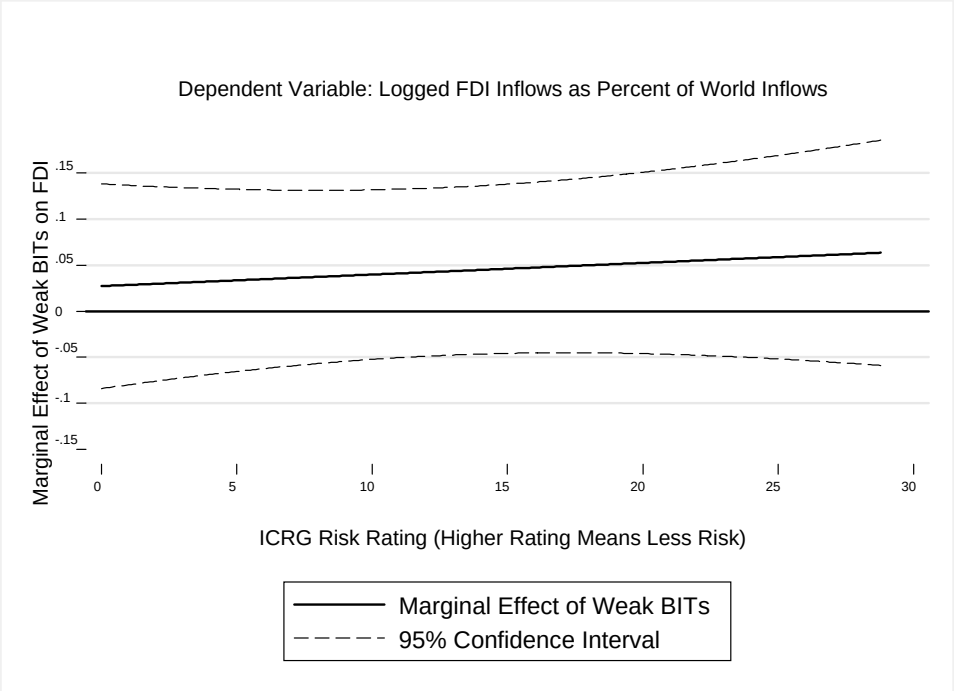


Figure 4.17: Marginal Effect of Weak BITs on FDI as Political Risk Changes



The most basic point to note is that the four figures support my general assertion that differences in dispute settlement provisions "matter". The direction of the conditional relationship between BIT

counts and FDI inflows strongly depends on the particular type of treaty. Strong BITs, which contain comprehensive, effective pre-consents to investor-initiated arbitration, show the basic pattern suggested by Neumayer and Spess: BIT effectiveness declines as political risk decreases. There is a similar negative, conditional relationship between promissory BITs, political risk, and FDI. But in the case of BITs with partial pre-consents to arbitration, and in the case of the weakest BITs, which contain no provisions for investor-initiated dispute settlement, the conditional relationship is the opposite of what we would expect. These latter kinds of BITs appear to become *more* effective at attracting FDI as political risk decreases, though the wide confidence intervals suggest that we are especially unable determine whether the effect is positive or negative at any particular level of risk.

The more important point is evident in Figure 4.14, which illustrates the effects of strong BITs on FDI share. We would expect strong BITs to be the *most* effective at attracting FDI, and for the causal effect to be statistically significant and positive across most if not all of the range of values of political risk. In other words, if BITs matter, it should be *these* BITs that matter most, and that matter most indisputably.

But Figure 4.14 instead shows indisputably that strong BITs *do not matter*. First, note that the point estimate is negative for a majority of countries in our sample. The median level of political risk on the ICRG scale is 17, and the marginal effects line crosses the zero line at approximately 14. Second, note that the direction of the estimated effect statistically unidirectional only at the very lowest levels of political risk. The only arguably clear success of the model is its indication that the weakest BITs, illustrated in Figure 4.17, have no statistically significant, positive effect on FDI inflows. This is, indeed, precisely what we would expect if the key to the (potential) effectiveness of BITs as credible commitment devices lies in their formal dispute settlement mechanisms, and not in diffuse host state concerns about developing a "reputation" for obeying their substantive treaty obligations.

In sum, then, where does the replication analysis leave us? Neumayer and Spess's evidence that BITs are effective at increasing FDI flows appears to rest on quite unstable ground. Only one of the four models illustrated in Table 4.2 reasonably succeeds in replicating their basic results, and this modest success is quite sensitive to a number of justified changes in estimation strategy and methodology. Disaggregating BITs on the basis of material differences in dispute settlement provisions only further muddies the analytic waters. The direction, magnitude, and significance of the effect of BITs on FDI share seems to depend on the formal remedial content of the treaties, but the differences are not always intuitive. The clearest finding is, perhaps, also the most dispiriting, at least from the perspective of developing countries eager to use BITs to attract greater shares of world FDI: the usefulness of BITs in the "competition for capital" appears to decline substantially as more BITs enter into force, suggesting that the golden age of BITs is long over.

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[1] Eric Neumayer and Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 33 WORLD DEV. 1567 (2005).

[2] M. SORNARAJAH, THE INTERNATIONAL LAW OF FOREIGN INVESTMENT 215 n. 32 & 268 (2004).

[3] Bruce Bueno de Mesquita, "Getting Firm on Replication," *in* "The International Studies Profession: Symposium on Replications in International Studies Research", 4 INT'L STUDIES PERSPECTIVES 72 (2003).

[4] Beth Simmons, Zachary Elkins, and Andrew Guzman, *Competing for Capital: the Diffusion of Bilateral Investment Treaties, 1960-2000,* INT'L ORGANIZATION (2006) (forthcoming).

[5] *See, e.g.*, Edward Crenshaw, *Foreign Investment as a Dependent Variable: Determinants of Foreign Investment and Capital Penetration in Developing Nations, 1967-1978*. 69 SOCIAL FORCES 1169, 1173 (1991).

[6] Neumayer and Spess report results for a model explaining FDI inflows as a share of developing country (rather than world) FDI inflows. However, they report in a footnote that they obtained substantively identical results using world inflows rather than developing country inflows.

[7] UNCTAD. BILATERAL INVESTMENT TREATIES IN THE MID-1990S (1998); UNCTAD. BILATERAL INVESTMENT TREATIES 1959-1999. (2001).

[8] Kristian Skede Gleditsch, *Expanded Trade and GDP Data.* 46 J. CONFLICT RESOLUTION 712 (2002).

[9] Data on natural resource intensity is provided by the World Bank's "green accounting" project, which attempts to measure (or, less generously but probably more accurately, "guesstimate") the sustainability of current development policies. As the World Bank explains on its website,

> Adjusted net saving, (also known as genuine saving), is a sustainability indicator building on the concepts of green national accounts. Adjusted net savings measure the true rate of savings in an

economy after taking into account investments in human capital, depletion of natural resources and damage caused by pollution.

…

… [E]stimates of the depletion of a variety of natural resources are deducted to reflect the decline in asset values associated with their extraction and harvest. Estimates of resource depletion are based on the calculation of resource rents. An economic rent represents the excess return to a given factor of production. Rents are derived by taking the difference between world prices and the average unit extraction or harvest costs (including a 'normal' return on capital).

[10]WITOLD JERZY HENISZ, POLITICS AND INTERNATIONAL INVESTMENT: MEASURING RISKS AND PROTECTING PROFITS (2002).

[11] http://www.icrgonline.com/.

[12] Neumayer and Spess also report separate results for each of these three ICRG components. In the interest of space I report results only for the ICRG composite measure that combines all three. The composite components are, in any event, very highly correlated.

[13] Neumayer & Spess, *supra* note 1, at 1582.

[14] Implemented using the -xtgls- command in Stata with the -ro- and -fe- options.

[15] *See* Helen Shapiro, *Determinants of Firm Entry into the Brazilian Automobile Manufacturing Industry, 1956-1968*. 65 BUS. HIST. REV. 876 (1991).

[16] For a relevant and brief review of the debate in the theoretical economic literature over whether FDI and trade (exports) are complements or substitutes, and some limited empirical evidence that they tend toward the latter, see Michael Pfaffermayr, *Foreign Outward Direct Investment and Exports in Austrian Manufacturing: Substitutes or Complements?* 132 WELTWIRT-SCHAFTLICHES ARCHIV 501 (1996).

[17] Nathan M. Jensen, *Democratic Governance and Multinational Corporations: Political Regimes and Inflows of Foreign Direct Investment*. 57 INT'L ORGANIZATION 587, 598 (2003); Neumayer & Spess, *supra* note 1, at 1574.

[18] Dunning notes that in 1975, the "primary product sector" accounted for only 24.5 percent of FDI outflows from the seven largest capital exporting countries; by 1988, figure was just 17.0 percent. JOHN H. DUNNING, MULTINATIONAL ENTERPRISES AND THE GLOBAL ECONOMY 25-6 (1993).

[19] *See* Jeffrey D. Sachs & Andrew M. Warner, *Natural Resources and Economic Development: The curse of natural resources*, 45 EURO. ECON. REV. 827 (2001).

[20] *See* Thomas Brambor et al., *Understanding Interaction Models: Improving Empirical Analysis*. 14 POL. ANALYSIS 63 (2005).

[21] *See* Bear F. Braumoeller, *Hypothesis Testing and Multiplicative Interaction Terms*, 58 INT'L ORG. 807 (2004).

[22] *See generally* Brambor et al., *supra* note 20.

[23] Ninety five percent confidence intervals are relatively demanding, but they are also relatively standard in the literature. We would reach different conclusions about the significance some of the results reported herein if we adopted a more lenient 90 percent confidence interval as the bar that need be cleared.

[24] The median ICRG risk rating for the sample is 17.

[25] Rick L. Williams, *A note on robust variance estimation for cluster-correlated data*. 56 BIOMETRICS 645 (2000) (emphasis added).

[26] A. Colin Cameron et al., "Bootstrap-Based Improvements for Inference with Clustered Errors," UC-Davis Department of Economics Working Paper # 06-21 at 2, *available at* http://www.econ.ucdavis.edu/working_paper_info.cfm?pid=368. The most influential recent reference is Marianne Bertrand et al., *How Much Should We Trust Differences-in-Differences Estimates?* 199 Q. J. ECON. 249-275 (2004).

[27] Gabor Kézdi, "Robust Standard Error Estimation in Fixed-Effects Models." Working paper available at http://ideas.repec.org/e/pke76.html.

[28] Implemented in Stata 9.2 as the command –iclassr–, here using the –ems– correction for unbalanced panels.

[29] Neumayer & Spess, *supra* note 1, at 1573.

[30] Nathaniel Beck & Jonathan N. Katz, *What To Do (and Not To Do) with Time-Series Cross-Section Data*, 89 AMER. POL. SCIENCE REV. 634 (1995).

[31] Nathaniel Beck & Jonathan N. Katz, *Nuisance vs. Substance: Specifying and Estimating Time-Series-Cross-Section Models*, 6 POL. ANALYSIS 1 (1996).

[32] Luke Keele & Nathan J. Kelly, *Dynamic Models for Dynamic Theories: The Ins and Outs of Lagged Dependent Variables*, 14 POL. ANALYSIS 186 (2006). Keele and Kelly recommend LDV models except where the dependent variable is non-stationary and where the residuals show strong evidence of autocorrelation. A Fisher test (implemented as -xtfisher- in Stata) indicates that the FDI share dependent variable is indeed stationary. There is, however, some evidence of first-order autocorrelation of the residuals, but correcting for the autocorrelation produces substantively similar results to those presented here.

[33] Nathaniel Beck, *Time-Series Cross-Section Data: What Have We Learned in the Past Few Years?* 4 ANN. REV. POL. SCIENCE 271, 290 (2001).

[34] The test is implemented as -xttest3- in Stata.

[35] The dependent variable in the PCSE model remains in its logged form.

[36] Keele & Kelly, *supra* note 32, at 203.

[37] Debora Spar, "Attracting High Technology Investment: Intel's Costa Rican Plant", Foreign Investment Advisory Service Occassional Paper 11 (April 1998), at 9, 14-15.

[38] *Id.* at 22.

[39] Enrico Pennings, "Learning from Foreign Investment by Rival Firms: Theory and Evidence," Paper presented at the WZB Economics and Politics Seminar Series, Berlin (Sep't 26, 2005), at 3.

[40] *See, e.g.*, Victor M. Gastanaga et al., *Host Country Reforms and FDI Inflows: How Much Difference do they Make*, 26 WORLD DEVELOPMENT 1299, 1306-1309 (1998).

CHAPTER FIVE

BITS & FDI: A FRESH START

§5.1: Introduction

The previous Chapter made the case that the most convincing evidence to date that BITs succeed in promoting FDI is far less robust than the casual reader of that original study would assume. The point is an important one, as policymakers in developed countries are no doubt using Neumayer and Spess's study to promote their own BIT programs, just as leaders in developing countries are undoubtedly taking the study into account when deciding whether to sign up.

In the present Chapter I move beyond replication to present results from a less parsimonious but more theoretically complete model of the determinants of FDI. The inconsistency of the results presented above suggests in part that the underlying model is poorly specified. First, and in particular, Neumayer and Spess, like most other empirical BIT analysts, wrongly assume that BITs are the only potentially meaningful law-based means by which host states can attempt to credibly commit to treat investors favorably. In fact, host states can invoke international law, broadly construed and to the benefit of foreign investors, through investment contracts, through non-BIT treaties, and by participating in investment insurance regimes. Second, reforms in municipal (domestic) laws related to foreign investment are likely to play a large role in promoting FDI. Ignoring these other legal changes and policy devices for encouraging FDI risks injecting serious omitted variable bias into the analysis.

The analysis in this Chapter provides the most comprehensive attempt to date to control for these other ways in which host states might seek to attract FDI. The subsections below briefly describe my independent variables. I then present the results for a simple but more fully specified additive model. And finally, I examine how adding interaction effects between BITs and political risk and BITs and between host state BITs and world BITs changes the implications of the analysis. In short, the additive model suggests that BITs are of no help in the "competition for capital", but that they may be of some use in promoting increases in FDI penetration *as long as the host state is willing to commit to international arbitration*. However, these modestly positive results largely disappear once we control interactively for the number of BITs in force worldwide and for the level of democracy in the host state. The interactive analyses suggest, in short, that developing countries today should expect to receive no significant increase in FDI as a result of entering into a BIT.

In the sections immediately below I discuss in detail the various control variables that must be included in any sound statistical analysis of the effects of BITs on FDI flows. The discussion here draws explicitly on the arguments advanced in Chapter Two.

§5.2 Legal Alternatives to BITs—the Investment Contract

I argued in Chapter Two that foreign investors have long had both the desire and capacity to negotiate with developing countries on the terms of their entry and operation well before BITs rose to prominence, and that in many instances they were able to legally secure the fruits of those negotiations through contractually based arbitration agreements. International arbitration clauses began to appear regularly in petroleum concessions in the middle of the last century and quickly came to be viewed as a necessary complement to contracts made in that particularly volatile sector.[1] Today arbitration clauses in foreign investment contracts are standard across economic sectors. Some municipal investment framework laws even expressly provide that foreign investors *must* enter into a foreign investment

contract with the host state, and that the contract shall contain an international arbitration clause.[2] These arbitration clauses, and any resulting awards, are enforceable in the same way, and with the same ease, as treaty-based arbitration agreements and treaty-based arbitral awards.

This suggests that our key empirical task at hand is to determine the extent to which a given host state is willing to use an investment contract to induce and investment to take place when the investor would not otherwise invest. Unfortunately, obtaining an accurate and comprehensive indicator of the use or content of investment contracts is impossible because the contracts are not systematically collected and published. But best-guess estimates suggest that investment contracts have been and remain an essential component of the modern regime of foreign investment protection,[3] and that many of those contracts do indeed contain host state pre-consents to investor-initiated international arbitration.[4]

In the analysis below I proxy a host state's willingness to enter into contractual arbitration agreements with foreign investors by recording whether a host state has ratified the ICSID and the New York Conventions. These are admittedly imperfect proxies, but they are not necessarily unreasonable ones. While ratifying the ICSID Convention does not by itself require states to arbitrate disputes with foreign investors, states that have no intention of doing so are unlikely to see much value in joining the treaty. We can thus view failure to ratify the ICSID convention as a strong sign that a host state rejects investor-state arbitration on principle as an undesirable intrusion on host state sovereignty. And ratifying the New York Convention, a highly successful treaty governing the recognition and enforcement of international commercial arbitration agreements more generally is also arguably a strong signal that a host state is generally willing to view international tribunals as an acceptable substitute for domestic courts.

§ 5.3 LEGAL ALTERNATIVES TO BITS: OTHER INVESTMENT-RELATED TREATIES

Although it is not often noted in the empirical BIT literature, a number of important international treaties contain investor-protection provisions that closely mirror some of the core provisions of BITs. The Energy Charter Treaty (ECT) is the prime example. The treaty is, quite literally, a multi-lateral "BIT" between over 50 (mostly European) states that promotes and protects investments in the energy sector. The ECT contains the same substantive and remedial provisions of the most modern BITs, including comprehensive state pre-consents to binding, enforceable investor-initiated international arbitration. Other notable and relevant treaties include formal applications to join the European Union (EU), which generally guarantee EU foreign investors favorable treatment in BIT-like language; the European Convention on Human Rights, which contains a "takings" clause, similar to Article V of the United States Constitution, that protects the property rights of foreign investors and which now provides for independent enforcement of those rights by an international tribunal;[5] and the OECD's various Declarations and Codes on foreign investment.[6] Given their potential to act as effective BIT substitutes, we should control for host state adherence to these international legal instruments. I accordingly include dummy variables indicating whether a host state has joined either of these four BIT alternatives.

§5.4 INTERNATIONAL LAW ALTERNATIVES TO BITS: INTERNATIONAL INVESTMENT INSURANCE

The BIT literature commonly overlooks the extent to which international investment insurance can function as a substitute for BITs. Almost all major capital-exporting states have set up state-sponsored or state-subsidized insurance programs for their foreign investors.[7] For example, the United States' Overseas Private Investment Corporation (OPIC) regularly issues millions of dollars in insurance against expropriation, currency transfer, and other "political" risks. The World Bank has also recently entered the insurance arena through its Multilateral Investment Guarantee Agency (MIGA). The

development of such programs has generally been widely supported by multinational corporations as an important means of reducing investment risk.[8]

The widespread availability of state-sponsored investment insurance programs poses potentially significant problems for the hypothesis that BITs should be expected to have a major, positive impact on FDI inflows, because it is not at all clear that the "extra" benefits that BITs provide to investors, compared to the benefits already provided by insurance, are all that great. To receive investment insurance the investor has to go through an application process, and he has to pay (often not very large) insurance premiums. For example, MIGA typically charges between 30 and 100 basis points per year for its coverage (0.30 percent to 1.00 percent of the value of the coverage). OPIC rates are of a similar magnitude, and are widely viewed as providing foreign investors with a subsidy.

BITs, of course, provide their protections to all comers, no application required and free of charge. But this does not mean that investors would necessarily prefer the protections of a BIT to the protections of investment insurance, because insurance virtually guarantees recovery in the event of a host state breach, regardless of the host state's willingness or ability to pay. BITs promise recovery, but only after potentially long and uncertain international arbitration proceedings and, possibly, costly award enforcement proceedings before national courts. Where a home state is already relatively generous in issuing investment insurance, then the fact that it subsequently enters into a BIT with a developing state might cause investors to forgo investment insurance (which is now largely but not completely redundant), but it will not necessarily promote much new FDI.

I include as independent variables the total exposure value of new investment insurance issued by MIGA or OPIC to cover investment projects in a given host state in a given year, measured in real millions of dollars. MIGA and OPIC are the most important investment insurance programs, but they certainly are not the only ones. The United Kingdom, Germany, France, and Switzerland, for instance,

have similar programs, as do the Japanese. Unfortunately I was able to obtain data only for the United Kingdom and German programs (and only after making the equivalent of Freedom of Information Act requests under those countries' own laws), and the data obtained goes back only to the early 1990s. Including the United Kingdom and German data would have unacceptably limited the sample.

§5.5 DOMESTIC LAW REFORM: CAPITAL CONTROLS

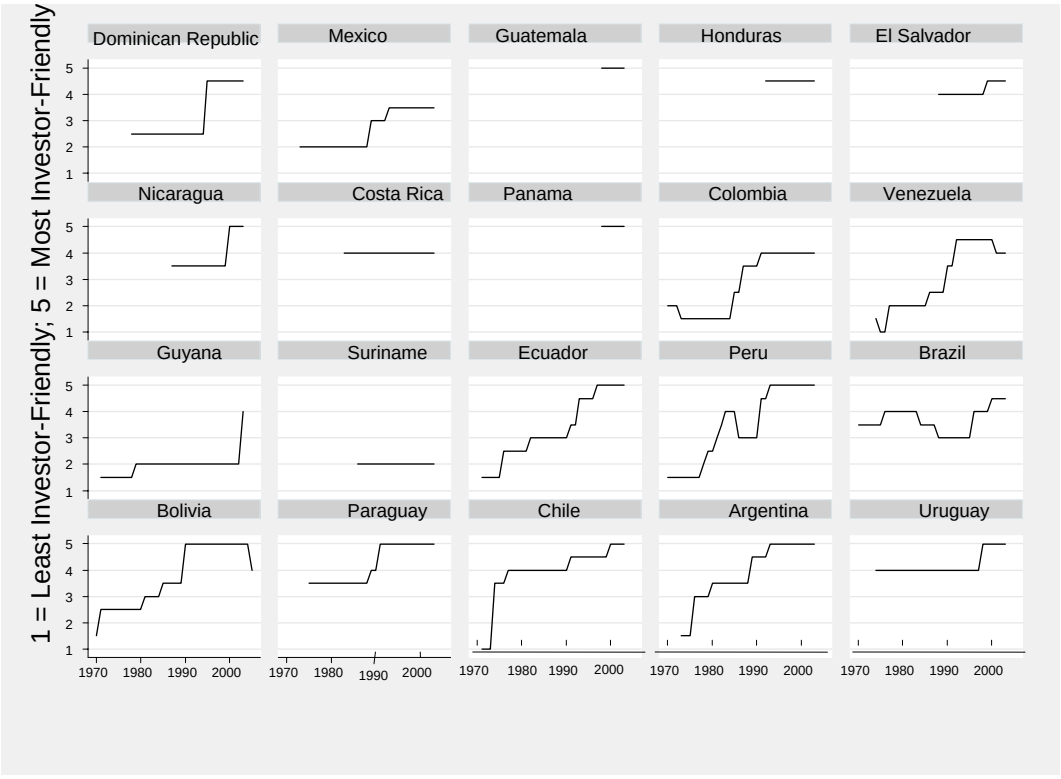
Non-specialists tend to assume that a host state's decision to enter a BIT is necessarily a decision to significantly liberalize FDI policy in the sense of removing barriers to entry or of preventing the host state from imposing burdensome performance requirements as a condition for entry. With the potential exception of United States BITs, which require national treatment at the pre-investment stage, this is simply not the case. Most BITs do not require host states to accept more investment, nor do most BITs prevent host states conditioning the right to establish an investment on the investor's acceptance of potentially onerous conditions of operation. Instead, what might be called the overall "liberality" of a host state's FDI regime is primarily determined by "promises"—in both actual and figurative sense—that are extended to investors through municipal law. For example, municipal law defines which sectors of the economy are open to foreign investment and on what particular terms; it determines tax rates, the availability of investment incentives, and conditions of operation. The vast bulk of what matters legally to foreign investors is supplied by municipal law, and indeed, this is unavoidable because BITs, as quite brief and general statements of the law applicable to investments of all types, are necessarily unable to provide investors or host states with a sufficiently detailed and self-contained legal regime. It is unsurprising that for much of recent history municipal investment "framework" laws have been the primary means both of promoting and controlling foreign investment in the developing world. because they provide a much greater opportunity to fine-tune the FDI regime according to the special needs of particular sectors.[9]

This is not to deny that the "law on the books" is always the same as the "law on the ground." In order to be effective formal laws must be administered and enforced, and it is undeniable that in many developing countries, in many time periods, and in many issue areas, there has been considerable slack between what the law books say and how those laws are applied. For example, in his study of Colombia's attempts in the 1970s to "control" foreign investment, Lombard argues that Colombia's strict regime was adopted largely for domestic political reasons, and that officials were often willing to grant foreign investors much more favorable terms of entry and operation as an exercise of discretion.[10] Tugwell has found a similar practical and mitigating flexibility in the application of Venezuela's formally and harshly nationalistic oil-sector foreign investment laws in the 1960s and 1970s.[11] And as Robinson details in his comparative study of national systems of "control of foreign business entry", developing countries often simply lack the administrative capacity to monitor and enforce the operation of (restrictive) FDI laws.[12] But these reality-based caveats aside, I think it inarguable that formal legal rules—are inevitably taken seriously by foreign investors, whether those rules are international or domestic in nature.

Figure 5.1, below, shows the results from an attempt to code changes in the favorableness of formal domestic-law foreign investment regimes in Latin American countries over the past three decades. To compile the figure I had a research assistant coder fluent in Spanish create historical time-lines of changes in the formal domestic "rules of the game" governing foreign investments in twenty countries, ranging in time from the early 1970s to 2003 (dependent on data availability). The coder gauged the level of "investor friendliness" of each domestic law regime on a scale of 1 to 5 (from least to most favorable), based wherever possible on hard copies of the relevant domestic laws. To identify those laws, and to cross-check his own evaluations of the important aspects of the laws and any changes, the research assistant conducted extensive country-specific searches of electronic databases of articles from the Economist weekly news magazine, the Financial Times, and the Wall Street Journal. The research assistant also consulted relevant law review articles. The coder used Chile's foreign investment law

regime of 1971-1973 under the Socialist president Allende as a baseline example of a "1"—the least favorable rating, Argentina's post-1992 regime as a baseline example of a "5"—the most favorable. Regimes were evaluated along a variety of axes, including the extent to which investment laws restricted or allowed foreign investments in particular sectors, the extent of mandatory registration or reporting requirements, the extent of promises of favorable treatment, currency repatriation, and the like. The final ranking represents the coder's subjective evaluation of the overall favorableness of the formal regime, relative to the two baselines. After coding the entire set of countries an initial time, the coder revisited each case to double-check the reasonableness of the evaluations and his consistency between countries. The rough model for the exercise was Stoever's attempt to map and analyze changes in the relative favorableness of Korean foreign investment law.[13]

Figure 5.1: Changes in Domestic Foreign Investment Laws in Latin America, 1970-2003

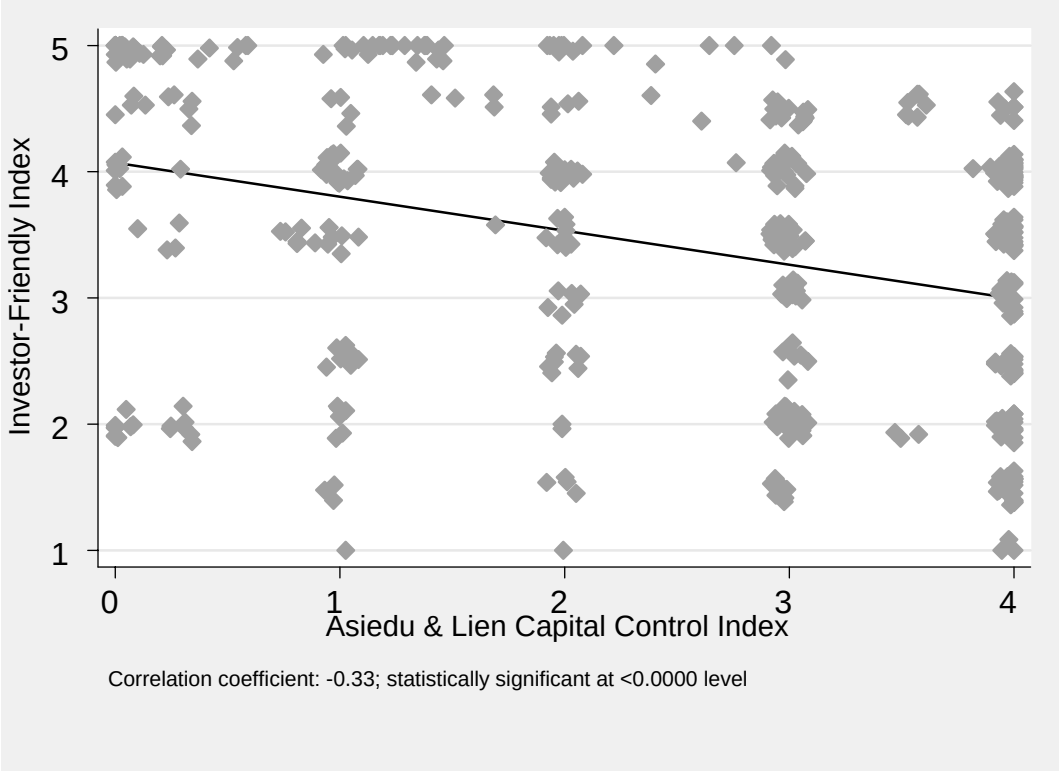


Let me emphasize that the results of the coding exercise are inherently subjective, and their suitability for use in regression analyses is debatable. It would be desirable, at the least, to have additional coders evaluate an overlapping sample of country-years in order to calculate inter-coder reliability coefficients. More generally, and less technically, accurately measuring changes in domestic FDI legal regimes for a sufficiently large number of countries and time periods is quite difficult. Investor-relevant laws are often scattered across a motley mixture of statutes, decrees, and administrative regulations, and are especially difficult to locate for more distant years, or to locate in a language readable by the researcher. Some of these problems are evident in Figure 5.1, where blank spaces indicate the impossibility of finding reliable domestic legal information for a number of Central American countries for a relatively large number of years. But for what it is worth, Figure 5.1 does illustrate the basic point of this Section: that over the course of the 1980s and early 1990s there has been a widespread liberalization of domestic foreign investment laws. In many cases these favorable changes have taken place concurrently with expansions in the particular country's BIT program, a fact that raises obvious problems of separating out the causal effects on FDI flows of one type of legal change, essentially domestic in nature, and the other, essentially international in nature.

Extending this type of in-depth comparative over-time analysis of domestic foreign laws to include more countries, in more regions, for as equally extensive a number of years, is a task well beyond the scope of this dissertation, and probably beyond the scope of any single researcher. This does not mean that reasonable proxies are unavailable. For example, Asiedu and Lien have compiled IMF data on three major categories of capital controls (including whether a country imposes exchange restrictions, restrictions on export proceeds, or restrictions on capital account).[14] These are relatively macro-level restrictions, and it is fair to suggest that foreign direct investors care more about finer-grained legal restrictions on their activities that are more intimately related to foreign *direct* investment than to measures aimed mostly at controlling "capital" flows of the portfolio sort. Nonetheless there is some evidence that IMF-measured capital controls do matter to foreign direct investors: Asiedu and Lien find

that the absence of these capital controls was significantly and positively related to FDI inflows during the 1990s. And as Figure 5.2, below, shows, Asiedu and Lien's data is significantly correlated with my own evaluations in the expected direction. The Figure shows a scatterplot of the data illustrated in Figure 5.1 with Asiedu and Lien's composite measure of capital controls, with the Asiedu and Lien data plotted along the x-axis. (Data points have been "jiggered" to give a better sense of their distribution). Higher numbers along the x-axis mean more extensive capital controls. My own FDI regime data is plotted along the y-axis. There, higher numbers indicate a greater level of "investor-friendliness". We see that countries with high levels of capital controls also tend to have less favorable domestic-law FDI regimes, as indicated by the downward sloping bivariate regression line. The two variables share a correlation coefficient of -0.33, statistically significant at the 0.0000 level.

Figure 5.2.: Bivariate Relationship between Asiedu and Lien Capital Control Data and Subjective Ratings of Domestic Foreign Investment Laws



In the models analyzed below, I accordingly control for changes in the capital control regime using the Asiedu and Lien data (which I extended to 2003).

§5.6 Domestic Law Reform: Privatization of State Assets

It is also clear that developing country privatization reforms have great potential to encourage FDI inflows by opening up important sectors of the economy to foreign participation. In many cases privatization reforms were legally and/or temporally closely linked to broader domestic reform efforts.[15] I accordingly include a variable measuring the total proceeds that a host government receives in a given year from privatization, measured in real millions of dollars. I use privatization data collected by the World Bank, and for the years 1985-1987, from data collected by Nancy Brune.[16] Unlike other variables in the analysis, I do not lag the privatization variable because FDI linked to privatization efforts will likely be invested in the same year that the host state receives the proceeds.

§5.7 Other Control Variables: Market & Economic Conditions

I include a number of standard controls for relevant economic conditions. GDP (as a measure market size); GDP per capita (as a measure of market wealth); GDP growth (measuring market performance); the rate of inflation (as a proxy for macroeconomic stability); and trade openness (constructed as the value of imports plus export divided by GDP). The three GDP variables are taken mostly from the World Bank WDI, with missing values filled in with data from Gleditsch's "Expanded Trade and GDP" database. Inflation data (in GDP deflator form) is also from the WDI, and trade openness data is constructed from WDI data and from Gleditsch's data set. All values are untransformed (i.e. not logged) and, where relevant, they are measured in constant millions of dollars. Because GDP growth tends to be relatively volatile year-to-year, and because foreign direct investors presumably have relatively long-term timelines, I have converted the growth variable into a five-year moving average.

However, substituting year-over-year GDP growth, lagged one period, does not affect the reported results for the other variables.

§5.8 Other Control Variables: Political Regime

The international relations literature suggests quite strongly that a host state's regime type matters to foreign investors. Regime type is usually understood as the degree to which a host state is democratic or autocratic. Jensen, for instance, has found that democracies attract more FDI inflows than autocracies, and Li has found that democracies are less likely to need to use tax incentives to attract FDI.[17] The causal story is typically one of "veto points." As Li puts it, citing Jensen and Henisz,

> One reason that democracy and autocracy adopt different levels of tax incentives is because they differ systematically in terms of property rights protection and policy credibility. The possibility of property rights violations, such as expropriation, seizure of assets, contract repudiation, and government corruption weigh heavily in the calculus of FDI decisions. Democratic institutions, such as the dispersion of power, the constrained executive, the large number of veto players over public policy, legislative and judicial power, the diversity of views in the legislature, and the independent judiciary, collectively serve to strengthen the rule of law and secure private property rights. These institutions constrain the power of the leaders, allow political representation of various interests, and raise the costs of supplying private benefits, all of which make state commitment to the rule of law credible.[18]

In the analysis below I accordingly include the widely used 21-point Polity IV scale of democracy and autocracy as a measure of host state regime type. I have rescaled the measure so that it runs from 0 (the highest level of autocracy) to 20 (the highest level of democracy).

It is worth noting, however, that there is very little *direct* evidence that investment professionals actually consider developing-country democracies to be safer places to invest. Figures 5.2 and 5.3, immediately below, illustrate the bivariate relationship between the level of democracy, on the one hand, and subjective measures of policy continuity and risk of nationalization on the other. The policy continuity and nationalization risk measures are constructed by BERI, SA based on expert surveys. As

used in the figures below, the policy continuity measure covers 782 country-year observations over the period 1985-2003. The nationalization-risk variable covers 120 developing countries in the year 2002. We see that the bivariate relationship between democracy and the survey measure very inconsistent. Figure 5.2 shows that investor perceptions of policy continuity are *negatively* correlated with democracy. Counter-intuitively, more democratic developing countries are perceived to have less stable policy environments. The correlation coefficient, however, is not terribly great (-0.17), though it is statistically significant at the 0.000 level. In Figure 5.3 we see an opposite and more intuitive relationship. More democratic developing countries have higher nationalization risk ratings, with higher ratings indicating less risk. Here the correlation coefficient is more substantial (0.28) and statistically significant at the 0.002 level.

Figure 5.3: Bivariate Relationship between Democracy and Perceptions of Policy Continuity

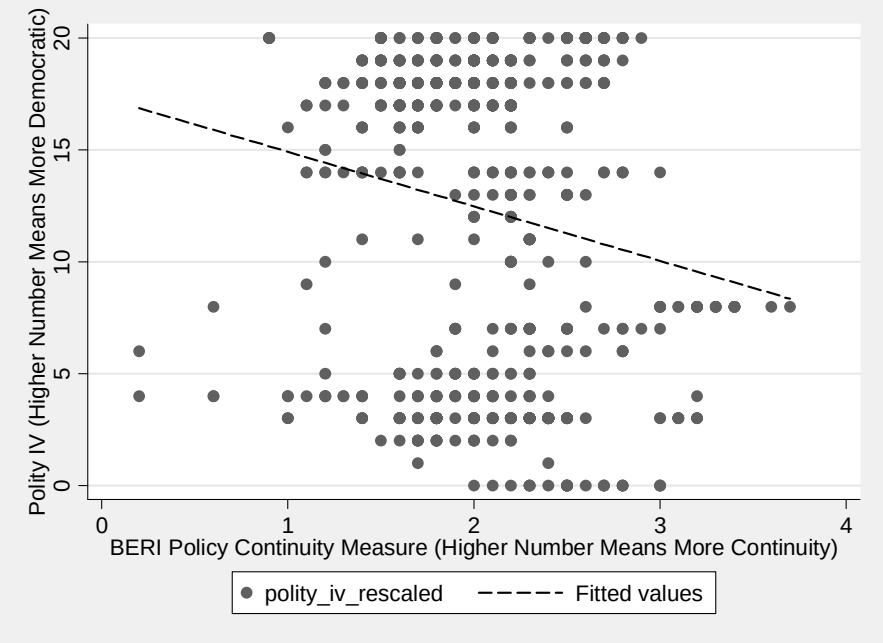
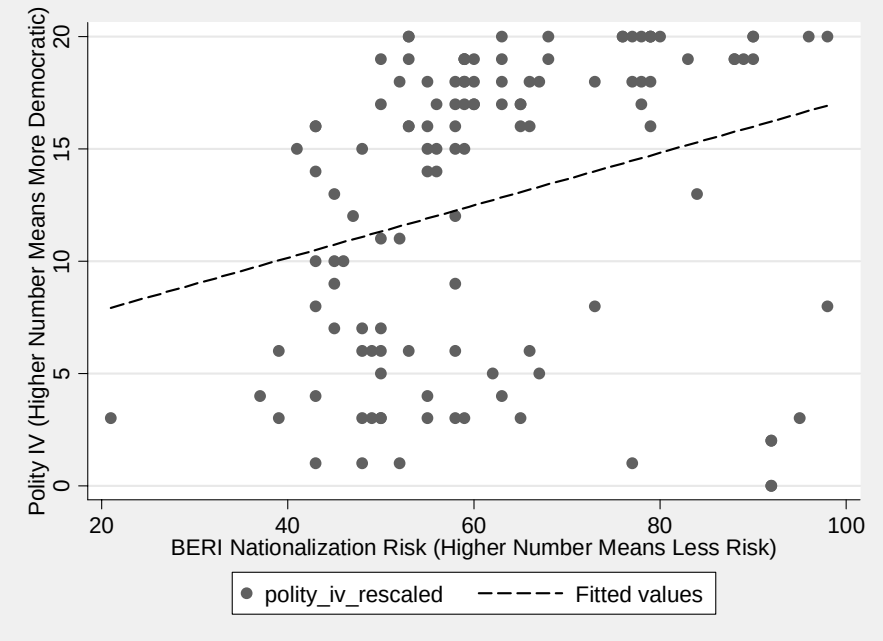


Figure 5.4 Bivariate Relationship between Democracy and Perceptions of Nationalization Risk



I have not included a separate measure of "veto points" because the measure performed poorly in Neumayer and Spess's original study and in my replication above, and because the Polity IV data is available for more recent years. However, it is worth noting that the WDI measure of veto points is highly correlated with the Polity IV measure of democracy, with a correlation coefficient of 0.67 (significant at the 0.0000 level). In that respect, including a measure of democracy would seem to proxy, to a reasonable degree, a "veto points" concept of political risk.

§5.9 RESULTS FROM THE ADDITIVE MODEL

Table 5.1 presents summary statistics for the variables used to estimate the simple additive models analyzed in the present Section. Table 5.2, which immediately follows, presents results for the models themselves, using three dependent variables: FDI inflows measured in constant dollars, FDI inflows as a percent of total world inflows (our measure of whether a developing state is winning the "competition for capital"), and FDI inflows as a percent of host state GDP, our measure of foreign capital "penetration." (Substituting FDI inflows as a percent of total FDI inflows to developing countries for the FDI share variable in Model II produced results substantively similar to those presented below). Each of the three models is estimated using OLS-PCSE. Models I and II contain an LDV, but the third model does not. This is because diagnostic tests of Model III indicate that including an LDV induces significant first-order serial autocorrelation where, absent the LDV, there is none.[19] In any event, including an LDV in Model III does not substantively change the key results, and the LDV itself is statistically insignificant. I briefly discuss the results for the various control variables, leaving the more in-depth discussion of the key variables of interest—the disaggregated BIT variables—for the end of the subsection.

Table 5.1: Summary Statistics for Table 5.2, Model III

		Mean	Std. Dev.	Min	Max
Dependent Variable	FDI, % GDP	2.49	6.41	-83.02	145.17
BIT-Like Treaties	ECHR	.10	.30	0	1
	ECT	.06	.24	0	1
	EU	.08	.27	0	1
	OECD Decl'n	.06	.25	0	1
Openness to Arbitration	ICSID	.71	.45	0	1
	NY Conv'n	.58	.49	0	1
Investment Insurance	MIGA, $ Insured	4.99	23.55	0	333.60
	OPIC, $ Insured	17.66	72.53	0	1026.91
Domestic Investment-Related Policy	Capital Controls	2.35	1.23	0	4
	Privatization $	116.29	492.49	0	9803.63
Economic Environment	GDP Per Capita	2403.62	3403.33	56.50	27226.46
	GDP Growth	3.38	4.13	-32.02	39.31
	Inflation	28.04	89.38	-29.17	968.54
	Trade Openness	83.78	179.27	0	4146.29
Political Regime	Polity IV	11.12	7.01	0	20
Weighted BITs in Force	Strong Dispute Settlem't	0.14	0.20	0	0.87
	Partial Pre-Consent	0.02	0.09	0	0.69
	Promissory Pre-Consent	0.01	0.03	0	0.24
	No Dispute Settlement	0.08	0.10	0	0.53
Note: Based on same 1,994 country-year observations as estimated in Table 5.2, Model III.					

Table 5.2: Reanalysis of the Determinants of FDI

		I. FDI Inflows, Millions Real $	II. FDI, % World	III. FDI, % GDP
BIT-Like Treaties	ECHR	238.659 (1.21)	0.023 (0.43)	-0.216 (0.26)
	ECT	-271.520 (1.54)	-0.068 (1.89)	-1.142 (2.18)*
	EU	-254.001 (0.90)	-0.019 (0.34)	0.353 (0.69)
	OECD Decl'n	518.938 (0.73)	-0.198 (1.40)	-0.009 (0.02)
Openness to Arbitration	ICSID	188.878 (1.08)	-0.007 (0.16)	0.655 (2.05)*
	NY Conv'n	-38.408 (0.31)	0.028 (0.68)	0.672 (2.17)*
Investment Insurance	MIGA, $ Insured	3.773 (1.60)	0.000 (0.49)	0.009 (3.24)**
	OPIC, $ Insured	-0.298 (0.37)	-0.000 (0.09)	0.002 (1.79)[a]
Domestic Investment-Related Policy	Capital Controls	-63.729 (1.53)	-0.004 (0.48)	-0.369 (3.07)**
	Privatization $	1.223 (6.00)**	0.000 (4.49)**	0.0006 (5.98)**
Economic Environment	GDP	0.019 (4.52)**	-0.000 (0.85)	-
	GDP Per Capita	0.306 (1.59)	0.000 (1.83)	0.0009 (5.38)**
	GDP Growth	20.671 (3.04)**	0.006 (4.16)**	0.445 (3.77)**
	Inflation	-0.528 (0.97)	-0.000 (0.77)	0.005 (3.23)**
	Trade Openness	0.034 (0.34)	-0.000 (1.04)	-0.008 (1.37)
Political Regime	Polity IV	-11.009 (1.84)	-0.003 (2.14)*	0.077 (3.36)**
Lagged DV	Lagged DV	0.495 (6.36)**	0.449 (5.52)**	-
Weighted BITs in Force[20]	**Strong Dispute Settlement**	**-717.607 (1.61)**	**-0.119 (1.34)**	**1.245 (2.17)***
	Partial Pre-Consent	**1265.467 (0.65)**	**0.706 (0.81)**	**2.748 (2.15)****
	Promissory Pre-Consent	**3522.198 (1.79)**	**1.100 (1.70)**	**7.527 (3.08)****
	No Dispute Settlement	**-253.961 (0.21)**	**-0.011 (0.04)**	**-0.238 (0.11)**
Unit Effects	Country Dummies	*Yes*	*Yes*	*Yes*
	Observations	2004	2004	1994
	Countries	128	128	127
	Period	1985-2003	1985-2003	1985-2003
	R^2	0.86	0.79	0.38

Notes: Estimated using OLS with Panel-Corrected Standard Errors. Z-scores are in parentheses, and Models I & II are corrected for first-order autocorrelation. * and ** indicate significance at the ≤ 0.05 and 0.01 levels respectively.

The economic variables do not deserve much comment, except to note that they perform reasonably well and generally as expected. It is particularly noteworthy that the lagged dependent variables are among the most statistically and substantively significant of the bunch. Model I, for example, suggests that a one dollar in past investment flows is associated with nearly 50 cents of investment in the present period. Likewise, Model II suggests that a one percent increase in past FDI share is associated with an increase in FDI share of over 40 percent in the present period. Both results provide extremely strong support for the "follow the leader" theory of investment decision-making. Foreign investors appear to pay very strong attention to whether or not the behavior of other investors demonstrates confidence in the particular host economy.

As to the policy- and law-related variables, first take a look at the four treaty-based alternatives to BITs. The results here are disappointing in the sense that the variables are mostly insignificant. None are significant in the first or second model, and only the ECT variable is significant (but wrongly signed) in Model III, our model of FDI penetration. With the exception of this latter, counterintuitive result, the general insignificance of the non-BIT treaties may be due, in large part, to the fact that these non-BIT treaties generally lack guaranteed access to international dispute settlement, lending their investor-friendly promises less inherently credible. The ECT result is more difficult to explain, though it is worth pointing out that the ECT is sector-specific, while my dependent variables are not. It may be the case that the ECT succeeds in promoting *energy*-sector FDI to host states that otherwise tend to under-perform in attracting FDI more generally and on net.

A host state's general openness to international arbitration, as proxied by ratification of the ICSID and New York Conventions, is not a significant predictor of FDI inflows in the first two models. But in the model of FDI penetration, both are significant and signed as expected. This suggests, at least tentatively, that a greater willingness to arbitrate investment disputes gives investors greater confidence to

invest. The measures of the use of investment insurance perform similarly. Both the MIGA and OPIC measures are insignificant in the first two models, but the MIGA variable is significant and correctly signed in the FDI penetration model, while the OPIC variable approaches statistical significance. This latter result for the MIGA variable provides what is, to my knowledge, the first statistical evidence that investment insurance serves to promote investment that would not otherwise have taken place, rather than simply to subsidize insurance that would have been made even absent the insurance.

The Polity IV democracy variable, which the international relations literature suggests might reasonably be viewed as a proxy for political risk or of the overall quality of government institutions, performs inconsistently. In the FDI penetration model, it is significant and signed, just as international relations theory would lead us to expect. More democratic countries, which presumably enjoy greater degrees of policy stability, appear to receive greater FDI inflows as a percent of GDP. The Polity IV variable is also significant in Model II, but here it is negatively signed, implying that more democratic countries tend to receive smaller shares of world FDI. I offer no explanation for the contradictory findings, except to suggest that more work on the effects of democracy on foreign investment certainly deserve further and deeper study. It is worth noting that in Jensen's own study of the effects of democracy on FDI, he reports results only for a model using FDI penetration as the dependent variable. The result reported in Model II is thus not necessarily inconsistent with his findings.

The two variables measuring domestic investment-related law reforms generally perform as expected. The privatization dummy variable is very highly significant and correctly signed in all three models. This in turn suggests that past success at attracting FDI may, to some degree, be unsustainable in the future, as developing states simply run out of state assets to privatize. The capital controls variable is insignificant in the first two models, but is significant and correctly signed in Model III: restrictive capital controls are associated lower levels of FDI penetration.

The BIT variables are the major variables of interest, and the results here are likewise mixed. On the one hand, all of the BIT variables are statistically insignificant in the first two models. What is especially surprising given Neumayer and Spess's findings is that Model II provides no support for the notion that BITs are useful in the "competition for capital." Entering into large numbers of BITs, whether strong or otherwise, has no statistically significant effect on a developing country's share of world FDI. It is important to note too that multicollinearity does not appear to explain the models' failures. The average variance inflation factors (VIFs) for Models I and II are just over 3.2, and a small number of individual variables have VIFs of over 30. Particularly problematic are the GDP per capita variable and the ICSID variable, the latter of which appears to be highly collinear with certain of the country dummy variables. But systematically deleting these latter, high VIF variables from the models does not substantively affect the BIT variables. In fact, in most cases the BIT variables become *less* significant as high VIF variables are removed.

Our theoretical expectations are met, however, in the third model, which also generally performed as expected as to the other, non-BIT variables. In Model III we see that weak BITs (e.g. BITs that do not grant investors guaranteed access to international arbitration of investment disputes), are insignificant predictors of FDI penetration, while strong BITs, BITs with partial pre-consents, and promissory BITs are all significant, positive predictors of penetration. The magnitude of the effect of the non-weak BITs is relatively substantial. The analysis suggests that a one-standard-deviation increase in the strong BIT variable—roughly akin to entering into a BIT with a capital exporting country of the magnitude of the United States—can be expected to lead, on average, to an increase in FDI penetration of 0.27% (i.e. from 2.0% to 2.27%). This in turn implies an increase in FDI inflows of approximately 122 *million* dollars for an economy with a GDP roughly equal to the median country in the sample. Note that the coefficients on the partial pre-consent and promissory BIT variables are several times greater than the coefficient on the strong BIT variable. This result is admittedly counterintuitive, as there is no good reason to expect BITs with weaker dispute settlement mechanisms to be more effective at attracting

FDI than stronger treaties. In fact, the result for the partial pre-consent BIT variable is driven entirely by the special case of China, one of the most successful developing countries at attracting FDI in the past decade, and also one of the most prolific signers of BITs with partial pre-consents to arbitration. When China is excluded from the analysis, partial pre-consent BITs become statistically insignificant predictors of FDI. The exceptionally large coefficient on the promissory BIT variable is more difficult to explain, though one possibililty is that the legal nuance behind the distinction may in fact be too nuanced to be noticed by non-lawyers typically involved in the investment decision-making process. Instead, promissory BITs are perhaps better viewed as functionally equivalent to strong BITs, with the difference in magnitude of estimated effect on FDI penetration being largely an artifact of the relatively small number of promissory BITs in the sample. In any event, combining the promissory and strong BIT variables into a single measure returns very similar results to those reported in the Table.

The key results of the additive models are largely robust to changes in model specification and to estimation strategy. Adding the ICRG political risk variable used by Neumayer and Spess does not substantively affect the results for the BIT variables, nor does replacing the democracy variable with the World Bank measure of veto points used in the previous analyses. Logging the dependent variable does not change the BIT results substantively either. The results are also largely robust to using an unweighted count of BITs in force, in which each BIT counts as "1." The unweighted BIT variables in Models I and II remain stubbornly non-significant, but the BIT variables in Models III are now non-significant as well. In other words, un-weighting the BIT variables produce results that consistently suggest that BITs do *not* have a meaningful effect on FDI inflows, however measured. Estimating the models using GLS, robust and country-clustered standard errors and fixed effects also did not improve the performance of the BIT variables; indeed, when GLS was used *without* a lagged dependent variable, performance worsened in the sense that the BIT variables in Model III became insignificant, while the *strong* BIT variables in Models I and II became significant and *negatively* signed—results implying that entering into the strongest of investment treaties makes developing countries *less* desirable places to invest. Assuming an adequately

specified model, this result is quite difficult to explain, except that it suggests that the GLS results are unreliable, and that an OLS-PCSE-LDV estimation strategy is more appropriate. Again, multicollinearity is not behind the failure to find that BITs play a role in promoting FDI inflows. In the fixed effects GLS models average VIFs are well below 3.0, with no single variables having a VIF above 5.0.

As an additional sensitivity test I ran the models using three "undifferentiated" BIT variables that do not take account of differences in dispute settlement provisions. The first variable simply summed the four aggregated BIT variables. The second alternative BIT variable was the weighted sum total of *signed* BITs, but including only those BITs that eventually entered into force. The third BIT variable is a weighted count of signed BITs, regardless of whether the particular BIT ever entered into force. (This third variable is identical to that used in Chapter Four, in my replication of Neumayer and Spess's original analysis). Partial results are presented below in Table 5.3.

Table 5.3: Aggregating the BIT Variable (Partial Model Results)

	I. FDI Inflows, Millions Real $	**II. FDI, % World**	**III. FDI, % GDP**
BITs – In force, weighted, undifferentiated	-600.105 (1.38)	0.072 (0.70)	1.442 (2.59)**
BITs – Signed, weighted, undifferentiated, including only BITs that will enter into force	-600.106 (1.38)	-.041 (0.35)	1.151 (2.02)*
BITs – Signed, weighted , undifferentiated, including BITs that never entered into force (following Neumeyer and Spess)	-157.337 (0.31)	0.117 (0.14)	1.987 (3.11)**
Notes: All models include the same control variables as the models presented in Table 5.2 and were estimated using the same PCSE estimation strategy.			

Table 5.3 suggests that there is some, but perhaps not overwhelming, analytic utility to differentiating among BITs on the basis of dispute settlement provisions. On the one hand, aggregating the BIT variables into single counts has no *overall* affect on the significance or direction of the estimated

affect of BITs on FDI inflows. Models I and II continue to suggest that BITs have no statistically significant impact on absolute dollar amounts of FDI inflows, or on FDI share. Model III, on the other hand, continues to suggest that BITs generally *do* significantly and positively impact FDI penetration. But by disaggregating the BIT variable we are able to say something more nuanced about Model III, and something ultimately potentially more helpful to developing countries—if LDCs wish to have much hope of attracting additional FDI through BITs, they should be prepared to sacrifice their historical immunity to suit by foreign investors through pre-consents to investor-initiated arbitration. And unless they are China, a special case if there ever were one, those pre-consents should be broad-based, covering most or all investment disputes that might arise under the treaties.

§5.10: Residual Analysis of the Additive Models

Figures 5.5 through 5.10, immediately below, illustrate the results of post-estimation examinations of the residuals from Models II (FDI share) and III (FDI penetration). In the interest of space I have omitted comparable figures for the first model, in which the dependent variable is the absolute value of FDI inflows. Figures 5.5 and 5.6 show standardized normal probability plots of the residuals (using the -qnorm- routine in Stata). Figures 5.7 and 5.8 plot the residuals against the fitted values of the dependent variables. And finally, Figures 5.9 and 5.10 examine the distribution of residuals over time.

Figure 5.5: Standardized Normal Probability Plot, FDI Inflows as Percent of World Inflows

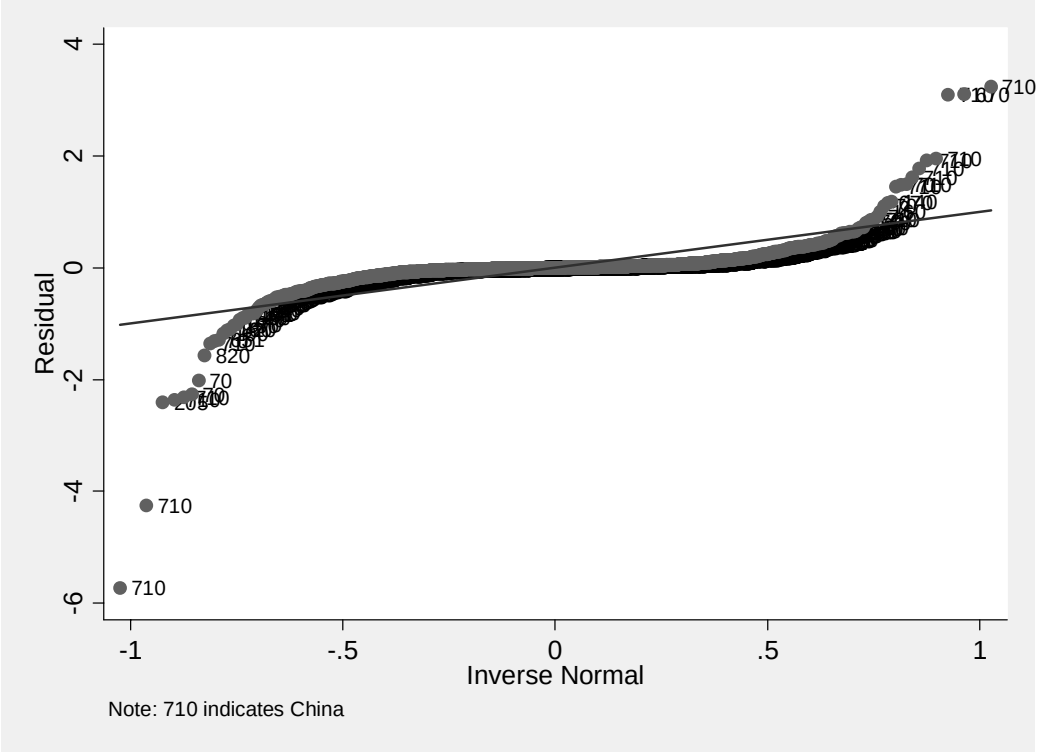


Figure 5.6: Standardized Normal Probability Plot, FDI Inflows as Percent of Host GDP

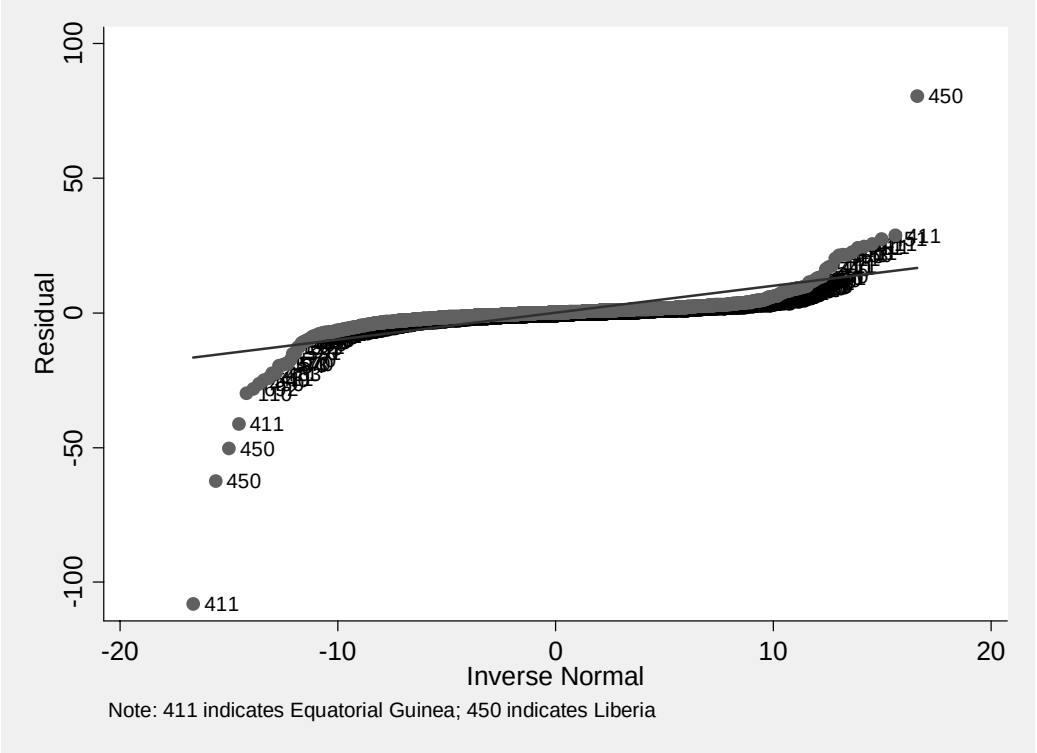


Figure 5.7: Residuals versus Fitted Values, FDI Inflows as Percent of World Inflows

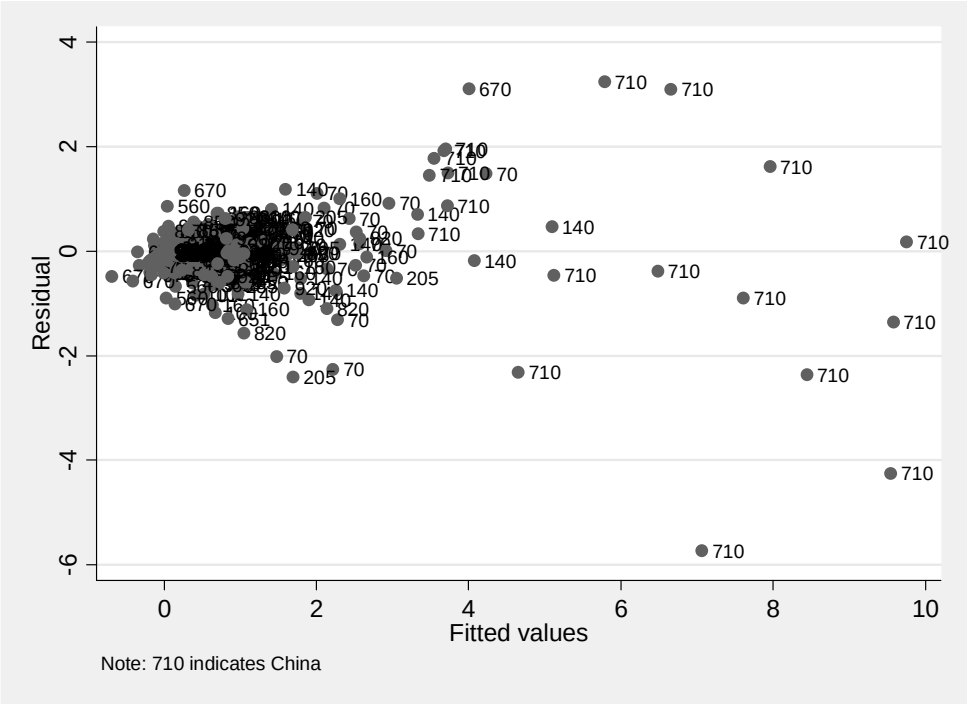
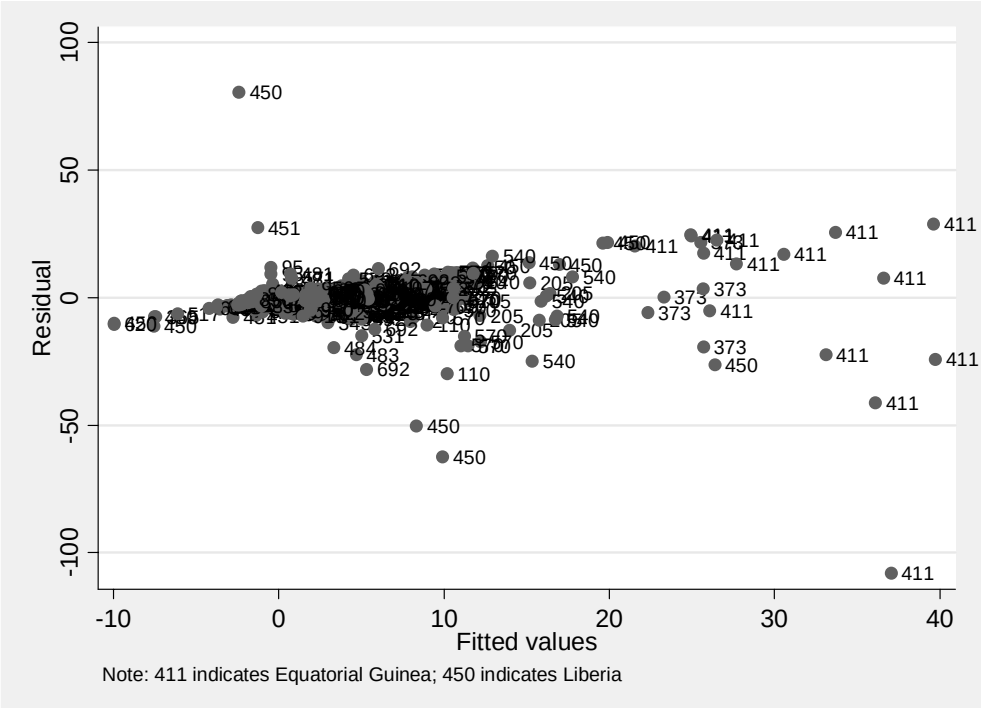


Figure 5.8: Residuals versus Fitted Values, FDI Inflows as Percent of Host GDP



The post-estimation diagnostics do not indicate any obvious, serious problems with the data. The normal probability plots suggest that the residuals are largely normally distributed, as they generally remain close to the diagonal reference line.[1] Deviations from the reference line are most pronounced at the tails of the distribution, and, as the figures indicate, these deviations are due a small set of particular countries: China where the dependent variable is FDI inflows as a percent of world inflows, and Equatorial Guinea and Liberia where the dependent variable if FDI penetration. Removing these outliers from the statistical analysis does not substantively change the reported results for the FDI penetration model. However, removing China from the FDI share model causes the strong BIT variable—which remains negatively signed—to become statistically significant at the 0.02 level. This is a theoretically problematic result, because it suggests that developing countries that enter into BITs are *less* competitive at attracting FDI than are developing countries that forgo BITs. The plots of the residuals versus fitted values illustrate a generally cloud-shaped pattern around the zero-line, though see once again that China (in the FDI share model) and Equatorial Guinea and Liberia (in the FDI penetration model) are quite noticeable outliers. Again, however, removing these outliers from the statistical analysis does not improve results for the BIT variables.

Figures 5.9 and 5.10 perform a final post-estimation diagnostic analysis. Here I have plotted he residuals over time. The plots indicate that the residual values are largely independent of time, though again China, Equatorial Guinea, and Liberia stand out as outliers.

[1] Histograms of the residuals (not shown) indicate that the distributions are highly peaked, but otherwise roughly normal (e.g. not severely skewed) in distribution. Logging the dependent variables does not improve residual distribution or eliminate outliers.

Figure 5.9: Residuals versus Time, FDI Inflows as Percent of World Inflows

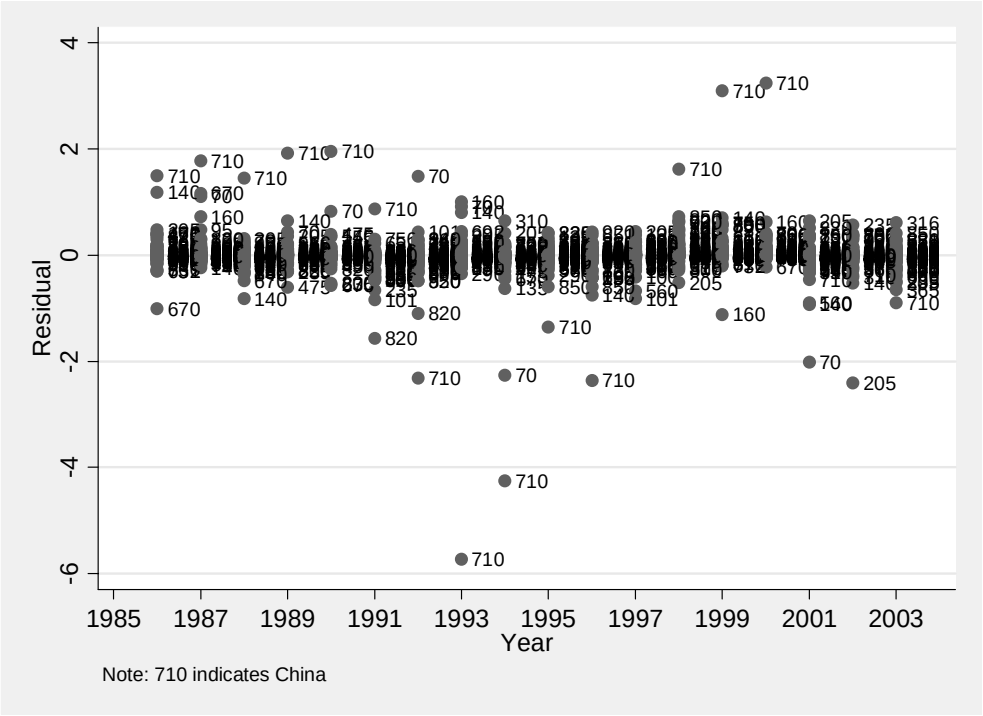
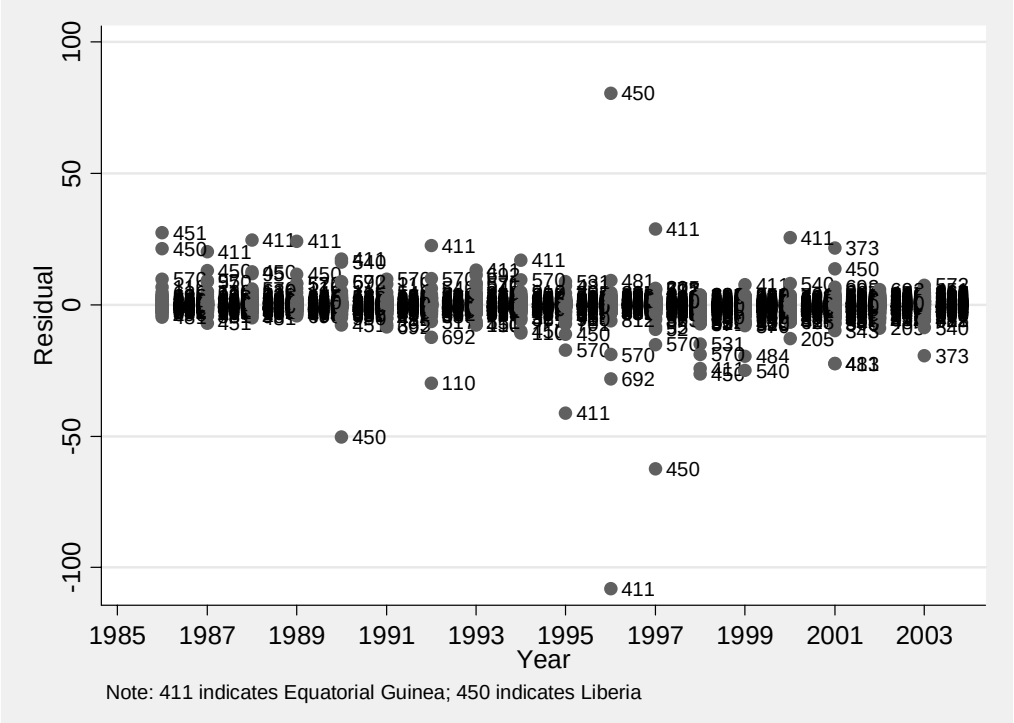


Figure 5.10: Residuals versus Time, FDI Inflows as Percent of Host GDP



§5.11: Sensitivity to Multiplicative Interaction Effects

The analysis presented in the previous subsection is open to the criticism that an additive model ignores one of the central insights of Neumayer and Spess's article: that the relationship between BITs and political risk should be a multiplicative one, and that as risk decreases, so should the marginal effects of BITs on FDI. It also ignores the underlying logic of the "competition for capital" by failing to include an interaction term controlling for the number of other BITs in force. The current subsection explores the effects of adding either interaction term to the additive model. I also present results for a model that includes both interactions, modeled as a three-way interaction term.

Interacting BITs and Political Risk: The ICRG Measure. Recall that the most successful of the additive models is Table 5.2, Model III, which uses FDI penetration as the dependent variable. Model III is also arguably the model of most inherent interest to developing countries, which are likely to care more about FDI penetration of their domestic economies than about their share of world FDI.[21] Figures 5.11-5.15 show the results of adding an interaction effect between the ICRG composite measure of political risk and each of the four disaggregated BIT variables to the FDI penetration model and for a model that aggregates all of the BIT variables into a single measure. I present results for the aggregated model first. I estimate the models using OLS-PCSE, and, except for the interaction effect and the ICRG risk component variable, all of the independent variables are the same as those presented in Table 5.9, Model III.

Figure 5.11: Marginal Effect of Aggregated BITs on FDI Penetration as Political Risk Changes

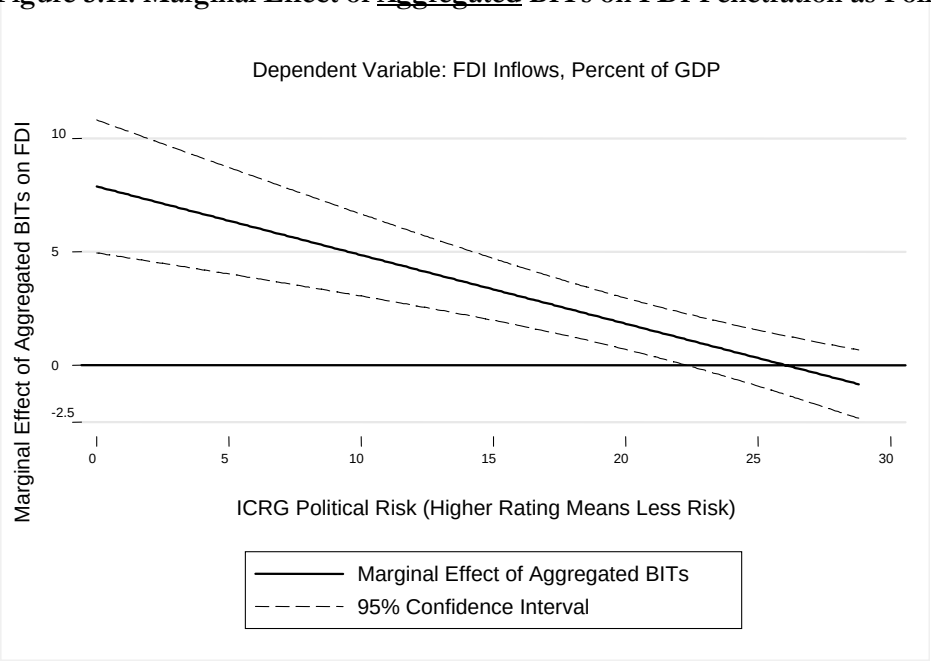


Figure 5.12: Marginal Effect of Strong BITs on FDI Penetration as Political Risk Changes

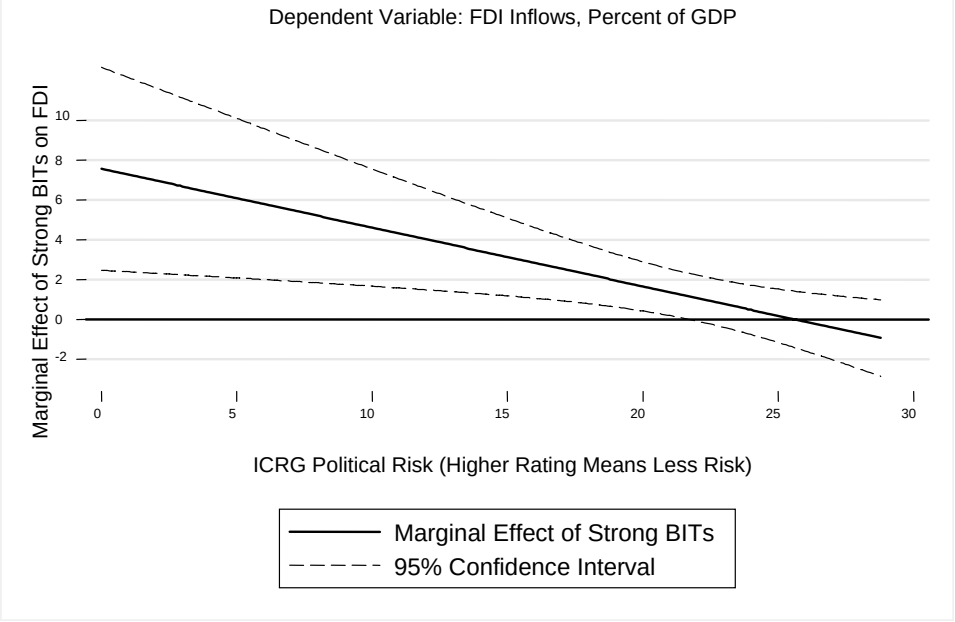


Figure 5.13: Marginal Effect of Partial Pre-Consent BITs on FDI Penetration as Political Risk Changes

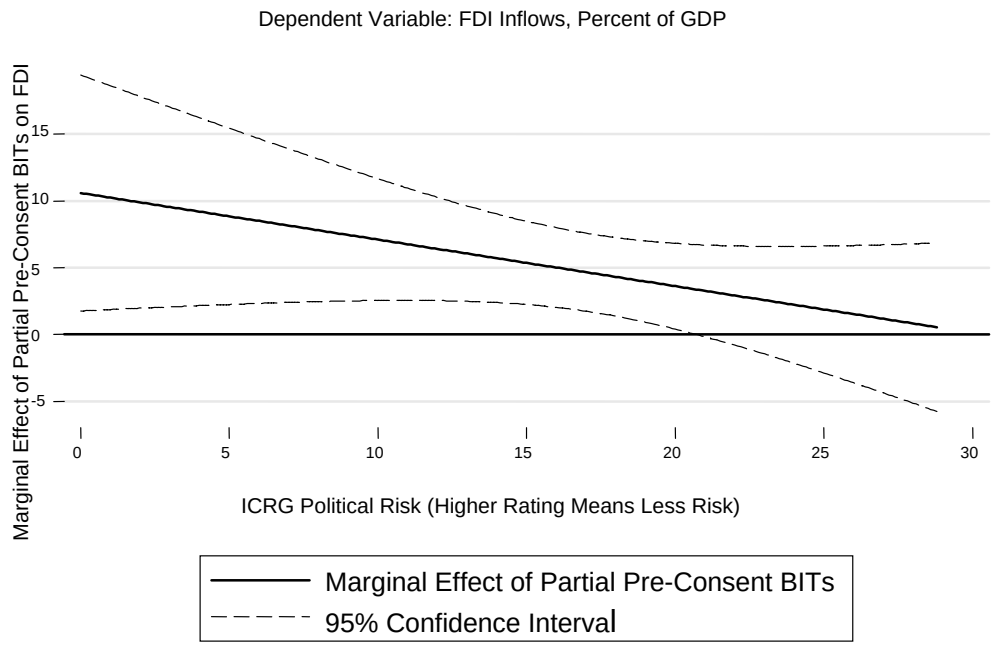


Figure 5.14: Marginal Effect of Promissory BITs on FDI Penetration as Political Risk Changes

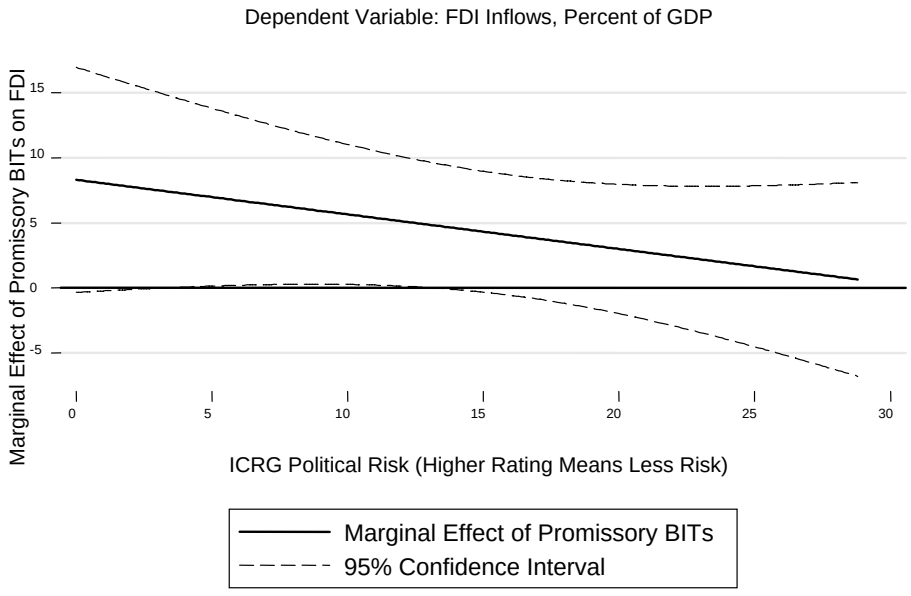
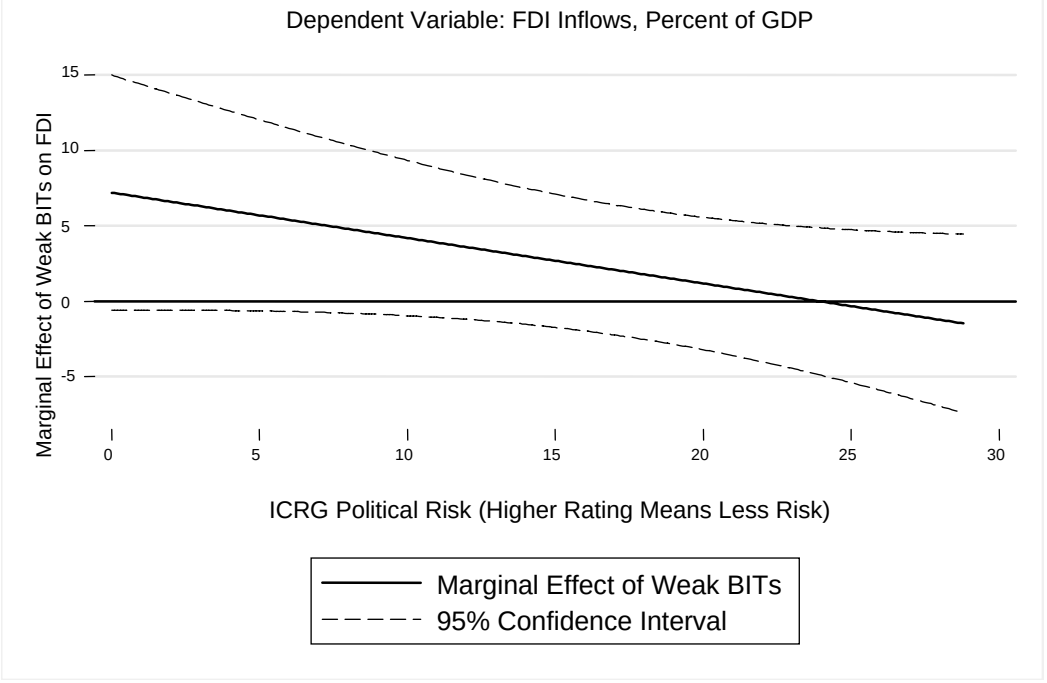


Figure 5.15: Marginal Effect of Weak BITs on FDI Penetration as Political Risk Changes



Figures 5.11-5.15 provide substantial support for Neumayer and Spess's interactive theory, and for my own theory that the BITs that matter are those that contain some reference to investor-initiated arbitration. Figure 5.11, for instance, shows that for all BITs considered together, undifferentiated by strength of dispute settlement, the estimated positive effect of BITs on FDI penetration declines as the ICRG measure increases in value, and thus as political risk decreases. And except for the lowest levels of risk, the confidence interval remains on the positive side of the zero line, suggesting that for most of the range of observed values of risk BITs have a statistically meaningful positive effect on FDI, as expected. This same general pattern is repeated in Figures 5.12-5.14, which examines the marginal effects of strong BITs, partial pre-consent BITs, and promissory BITs on FDI penetration. Again, the marginal effects line decreases as political risk decreases, and the effect of BITs on FDI penetration is significantly positive at most levels of risk, though again I caution that the results for partial pre-consent BITs are

driven largely by the special case of China, and that the results for promissory BITs are less reliable (as indicated by the wider confidence intervals) because of the relatively small number of observations. The more important caveat, however, deals with Figure 5.12, which illustrates the marginal effects of strong BITs. Recall that the median value of the ICRG risk variable in the sample is approximately 17. Figure 5.12 suggests that at political risk ratings of 22 or greater (representing approximately 17 percent of the sample observations) we cannot have confidence that BITs have positive rather than negative effects on FDI.

Compare these first four figures with Figure 5.14, which illustrates the marginal effects of *weak* BITs as the ICRG risk rating increases. Here we see that across the entire range of values of the risk index the confidence interval spans the zero line, indicating statistical insignificance. In other words, Figures 5.11-5.15 allow us to say with some confidence that BITs *can* help at least some developing countries to increase FDI penetration at lower levels of risk. Figure 5.15 adds a quite important nuance: the positive effect is unlikely to obtain if the treaties do not contain at least some provision for investor-initiated arbitration.

Interacting BITs and Political Risk: Polity IV. Figures 5.16-5.20, below, repeat the interactive exercise using the Polity IV measure of democracy as a proxy for political risk. The take-away lesson is that the direction of the conditional relationship, and the ranges of values over which the relationship is statistically significant, depends to a great degree on *how* we measure political risk, as the results here are markedly different than those obtained using the ICRG risk variable. Note for example that in Figures 5.16 and 5.17 (illustrating results for all BITs and for strong BITs respectively) that the marginal effects line slopes upward, indicating that as democracy increases, and as political risk *decreases*, that BITs become *more* effective at increasing FDI penetration. On the other hand, we can have confidence that the effect on FDI is positive only at the highest levels of democracy. Figures 5.16 and 5.17 suggest that the conditional effects of BITs on FDI penetration are significantly positive only when the level of

democracy is above approximately 12-14. The median Polity IV rating in the sample is just under 12, suggesting that for half of the observations in the sample, disaggregated and strong BITs can *not* be said to positively impact FDI penetration.

In other words, the evidence presented here is decidedly mixed that strong BITs, or all BITs considered in the aggregate, "matter" in the expected direction. Results are more consistently in line with theory as to weak BITs. Figure 5.20 shows a very weak conditional relationship between weak BITs and levels of democracy; furthermore, that relationship is never statistically significant.

Figure 5.16: Marginal Effect of Aggregated BITs on FDI Penetration as Democracy Changes

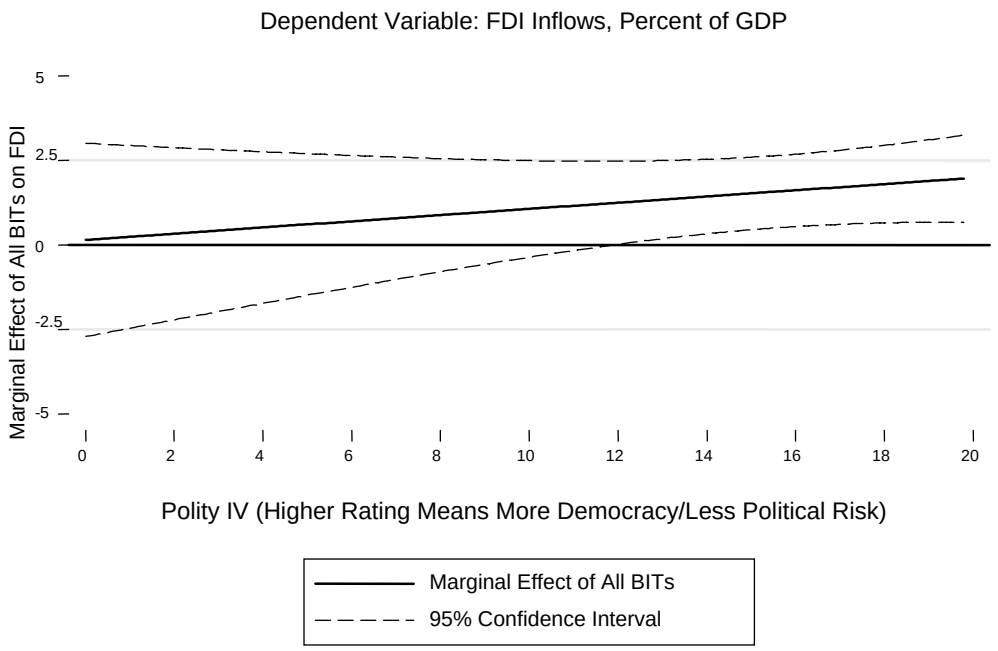


Figure 5.17: Marginal Effect of Strong BITs on FDI Penetration as Democracy Changes

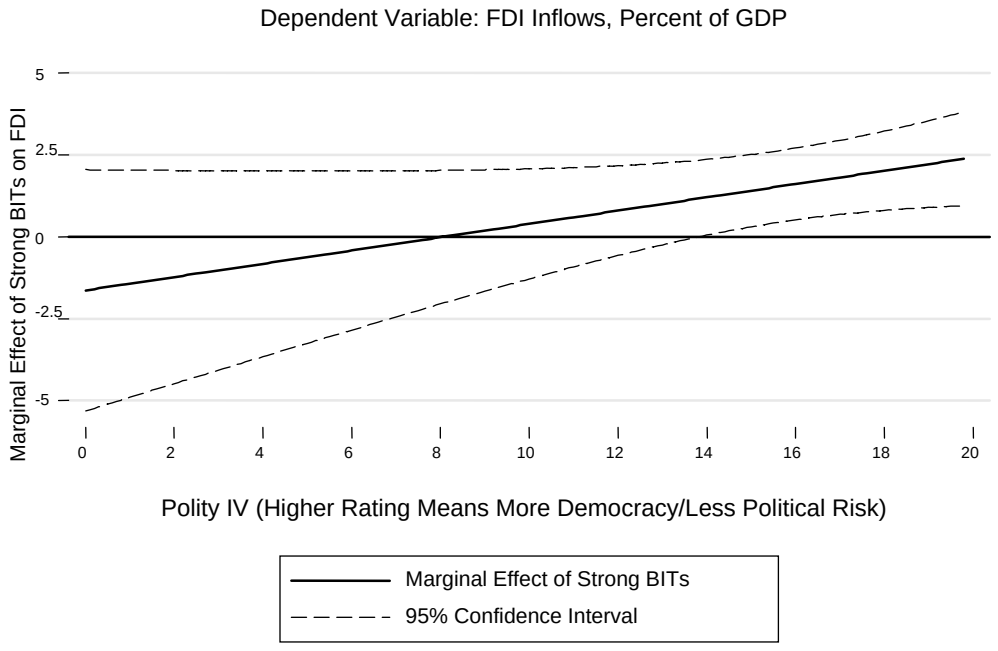


Figure 5.18: Marginal Effect of Partial Pre-Consent BITs on FDI Penetration as Democracy Changes

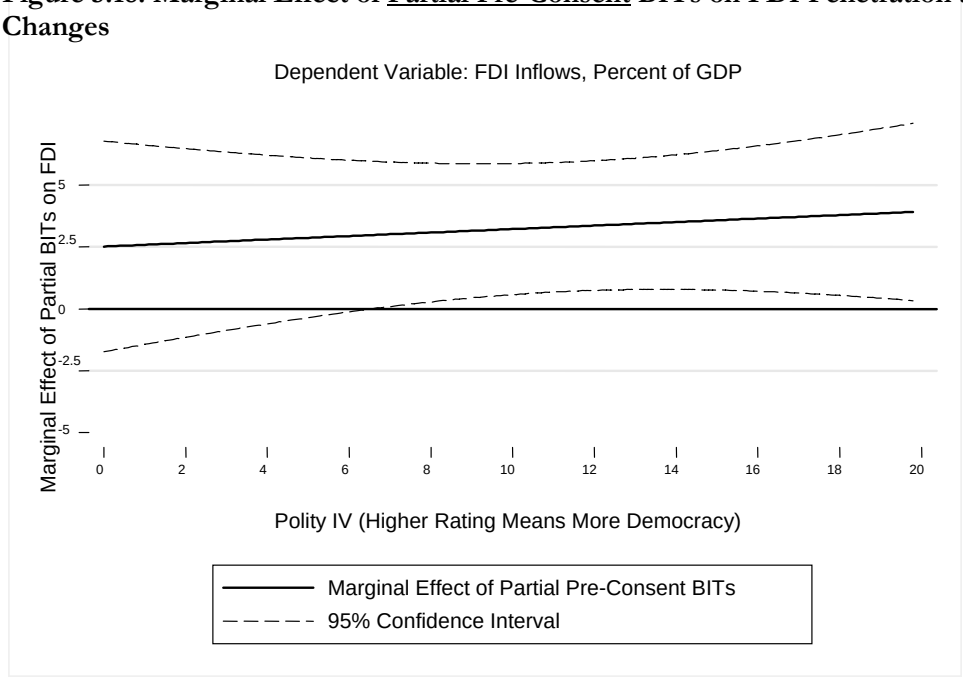


Figure 5.19: Marginal Effect of Promissory BITs on FDI Penetration as Democracy Changes

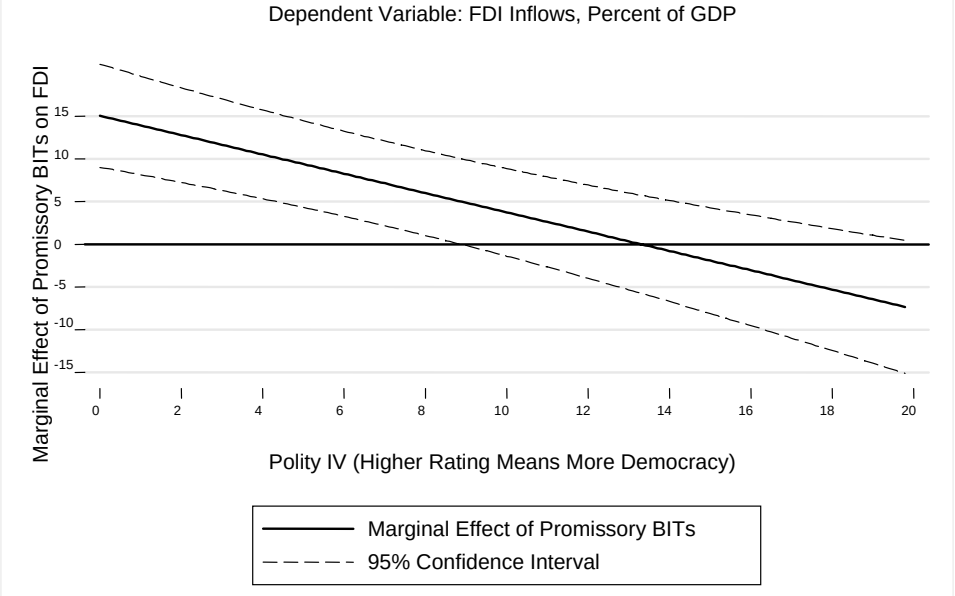
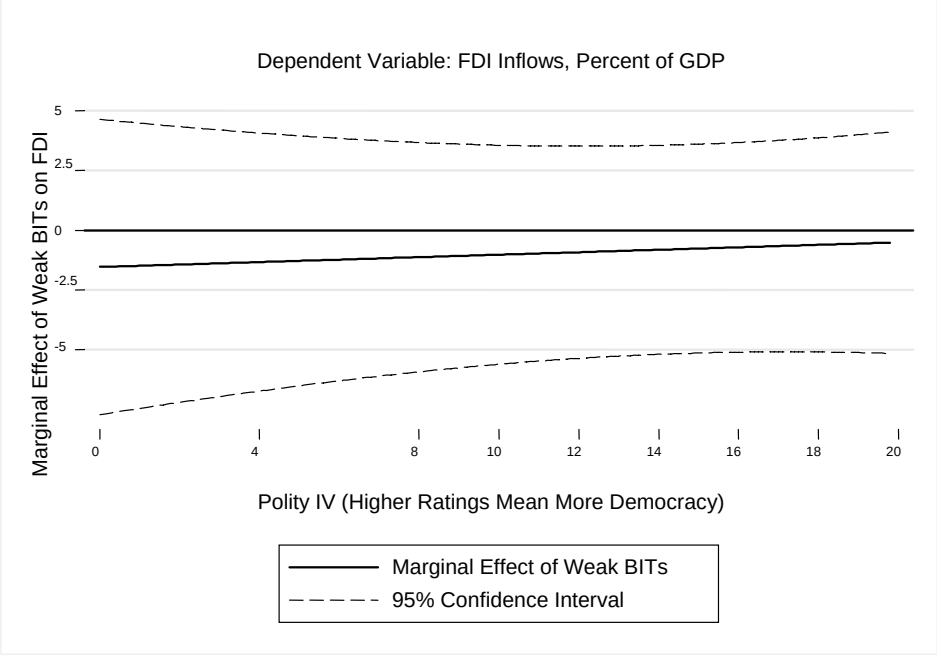


Figure 5.20: Marginal Effect of Weak BITs on FDI Penetration as Democracy Changes



How to explain the results of the BIT-Democracy interactions? The results suggest that democracy, like "veto points," is not a conceptually useful proxy for "political risk" of the type that BITs are said to reduce. The Figures make clear that BITs are *not* a substitute for (lack of) democracy, and that, from the perspective of the investor, more democracy is not necessarily a substitute for a BIT. Indeed, it is possible, if not likely, that democracies are correlated with some other latent, investor-friendly characteristic, either structural or policy-related, that is not adequately controlled for in our model.

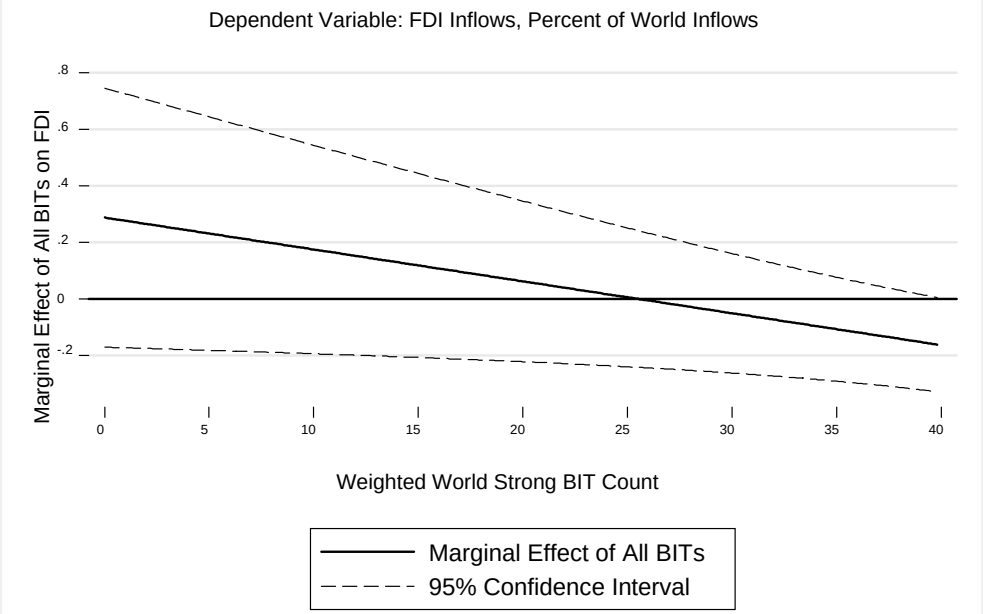
Interacting Host State BITs and World BITs. I argued above that the "competition for capital" thesis adopted by Neumayer and Spess and advocated by Elkins, Guzman, and Simmons suggests that BITs will decline in their competitive effectiveness as world BITs increase. The two figures below illustrate what happens when we add a multiplicative host BIT-world BIT interaction term to the additive model. The dependent variable here is FDI share rather than FDI penetration. A country's share of

world FDI is a better proxy for success in the competition for capital than FDI penetration, because the former proxy more closely taps the notion that "success" is equivalent to getting a larger slice than one's competitors of the total FDI pie. (However, while I do not reproduce the relevant figures here, the same negatively-sloping pattern illustrated in Figure 5.21 obtains when substituting FDI penetration for FDI share as the dependent variable, suggesting that BITs are becoming less effective at promoting FDI penetration as more and more states sign and ratify the treaties).

The models are again estimated using OLS-PCSE. The control variables are the same as those listed in Table 5.9, Model II, except that I include a weighted count of the number of *strong* BITs in force worldwide, which I adjust by subtracting each particular host state's number of in-force, strong BITs. I multiply this weighted, adjusted count variable with each of the four disaggregated BIT variables and, in a separate model, with an aggregated (undifferentiated) BIT variable. In the interest of space I reproduce below only the figures for the all-BIT interaction effect and the strong-BIT interaction effect.

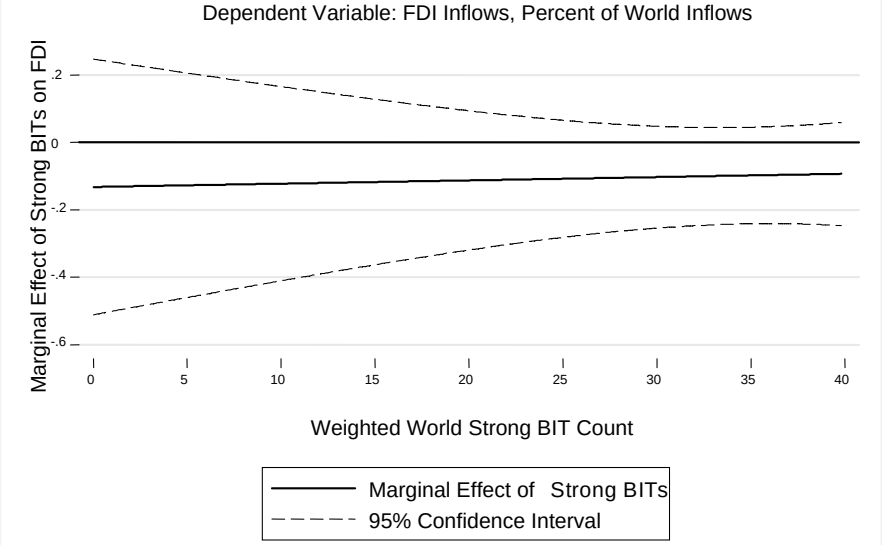
The results of the exercise provide some, but not perfect, support for theoretical expectations. Figure 5.21 shows that a host state's aggregated count of BITs declines markedly in effectiveness as the world count of strong BITs in force increases. In other words, in today's investment "market", entering into an additional BIT of *any type* can be expected to have less positive impact on FDI share than entering into an additional BIT in an earlier era, in which BITs were less common. The analytic caveat, however, should be obvious: the wide confidence intervals continuously span the zero line, suggesting that at no point in the history of BITs have they had a statistically significant impact on FDI share.

Figure 5.21: Marginal Effect of <u>All</u> BITs on FDI as World Strong BIT Count Changes



On the other hand, and looking at the interaction between *strong* BITs and the world BIT count (Figure 5.22, below), we see little evidence that the effectiveness of strong BITs declines as the world BIT count increases. In fact, the point estimate trends slightly upward as world BITs in force become more numerous. At the same time, however, the point estimate is counter-intuitively *negative*, and the wide confidence intervals suggest that we are unable to statistically determine whether the estimated effects of strong BITs on FDI share are in fact positive or negative at any level of world strong BITs.

Figure 5.22: Marginal Effect of Strong BITs on FDI as World Strong BIT Count Changes



The interactive results reported in Figure 5.21 are also robust to estimating the models using GLS with fixed effects, robust standard errors, clustered or unclustered by country. The same downward-sloping relationship is also evident when we use FDI penetration rather than FDI share as the dependent variable. In short, controlling interactively for the number of world BITs in force provides little to no evidence that BITs have ever, *or currently*, effectively serve to promote foreign investment.

Interacting Host State BITs, Political Risk, and World BITs. Here I offer a final complication to the interactive analyses presented above. If it is theoretically sound to argue that the effect of BITs on FDI share is likely to depend on *both* the number of BITs already in force worldwide *and* on a host state's background level of political risk, then a properly specified model will need to incorporate a three-way interaction term that multiplies a host state's own number of BITs in force by its level of political risk and by the world BIT count.

Figures 5.23-5.26 replicate Table 5.9, Model II, our additive model of FDI share, while including three-way interactions between each host state's BIT count, level of political risk, and the world BIT count. Figures 5.27-5.30 replicate Table 5.9, Model III, our additive model of FDI penetration, while again including the three-way interaction term and the term's individual components. The general model takes the form of

$$y = x + w + z + xw + xz + wz + xwz + \textit{(control variables)},$$

where y is FDI share or FDI penetration, x is the weighted BIT count variable, w is alternately either the Polity IV proxy for political risk or the ICRG political risk variable, z the weighted, adjusted count of world in-force strong BITs, and xw, xz, wz, and xwz are multiplicative combinations of those first three variables. To save space I again only present figures for models using the aggregate BIT variable (where BITs are undifferentiated by dispute settlement provisions) and the strong BIT variable.

I follow Brambor et al. in constructing the relevant figures, which are different, and indeed, more complex, than those presented previously.[22] The x-axis indicates different levels of political risk (or democracy), across the range of possible values. The y-axis indicates the marginal effects of BITs on FDI share. The plotted lines indicate the marginal effects of BITs on FDI share at different levels of political risk (or democracy), with a separate line plotted for each of *four different levels of world BITs*. The weighted world BIT variable ranges in observed value from 0 to nearly 40; I have selected four substantively meaningful and equally spaced values across that range. The solid plotted line represents marginal effects at a very low level of worldwide BITs (3); the dashed line represents marginal effects at a moderate-low level of worldwide BITs (15); the dotted line, at moderate-high levels of worldwide BITs (27); and the dashed-dotted line at high (e.g. current) levels of worldwide BITs (39). Instead of adding confidence intervals, which would unnecessarily clutter the Figures, I have followed Brambor et al. by

plotting asterisks (*) indicating the range of point estimates that are statistically significant at the 0.05 level.

Figure 5.23 illustrates the marginal effect of all (aggregated) BITs on FDI share as the level of democracy changes at different levels of democracy. There are three main aspects to note. First, as the weighted number of strong BITs in force across the world increase (e.g. as we move from the solid point estimate line to the dashed-dotted line at the bottom), the estimated marginal effect of BITs decreases, just as theory would predict. In other words, BITs appear to become less effective at attracting FDI share as more and more BITs come into force. Second, and more problematically for theory, the point estimates are statistically insignificant at almost all levels of democracy and of world BITs in force. BITs have a statistically significant effect on FDI share only at the highest level of world BITs (39), and even then, only when the particular host state is somewhere between a full democracy and a full autocracy. Third, and even more problematically, this statistically significant point estimate is *negative*—it suggests that BITs are actually *harmful* in the competition for capital.

Figure 5.23: Marginal Effect of <u>All</u> BITs on FDI Share As Democracy and Weighted World Strong BIT Count Change

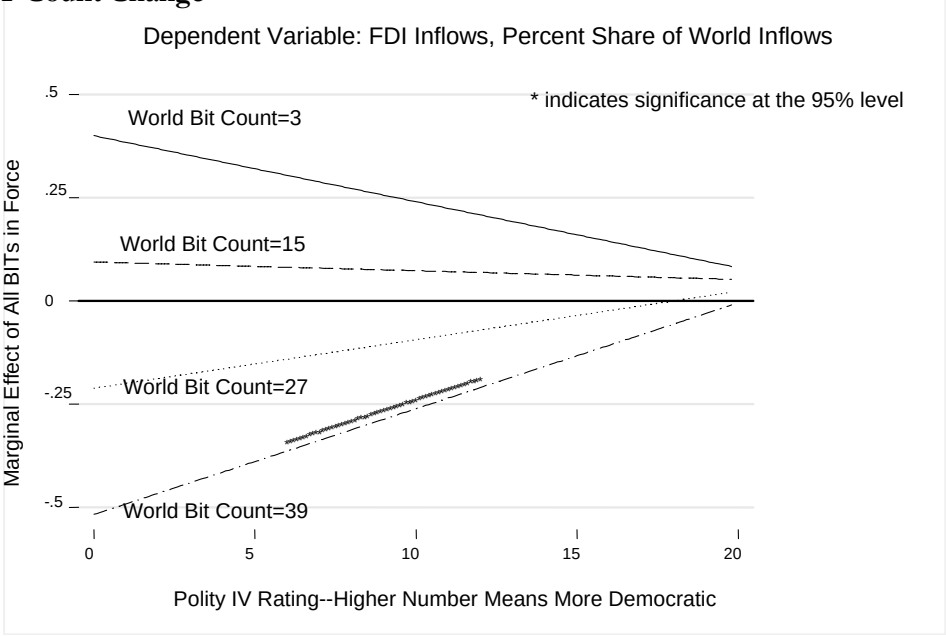
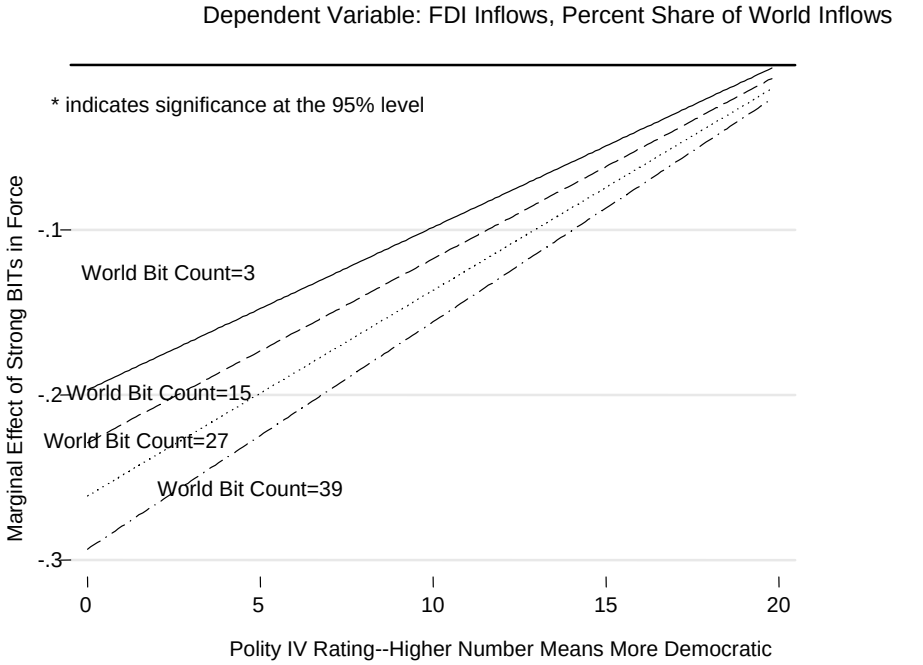


Figure 5.24, below, repeats the exercise for strong BITs. Here we are concerned with measuring the marginal effects of strong BITs entering into force, at different levels of democracy and of world strong BITs. The results are a complete statistical wash—at no levels of democracy or worldwide BITs do strong BITs have a statistically significant effect on FDI share. The result is especially surprising, because, recall, we would expect strong BITs to be most likely to induce FDI flows.

Figure 5.24: Marginal Effect of Strong BITs on FDI Share as Democracy and Weighted World Strong BIT Count Change



Figures 5.25 and 5.26 repeat the three-way interaction analysis using the ICRG measure of political risk. Again, the results generally fail to support the thesis that BITs are of any use in the competition for capital. In Figure 5.23 we see that the estimated effect of all BITs on FDI share declines as the number of worldwide BITs in force increases—again, as theory would predict. Furthermore, and as the asterisks note, the marginal effects are statistically significant (and correctly signed) only at very low levels of worldwide BITs (3), and only where political risk is *already relatively low*, with the effect *increasing* as political risk decreases. This latter finding runs quite contrary to Neumayer and Spess's prediction and finding that the effect of BITs decreases as political risk decreases. Figure 5.24 repeats the analysis for strong BITs. Here the results are, again, a statistical wash. Strong BITs, which should theoretically be the most effective of all BITs at inducing FDI flows, have no statistically significant marginal effects on FDI share at any level of ICRG political risk or at any level of worldwide strong BITs.

Figure 5.25: Marginal Effect of <u>All</u> BITs on FDI Share as Political Risk and Weighted World Strong BIT Count Change

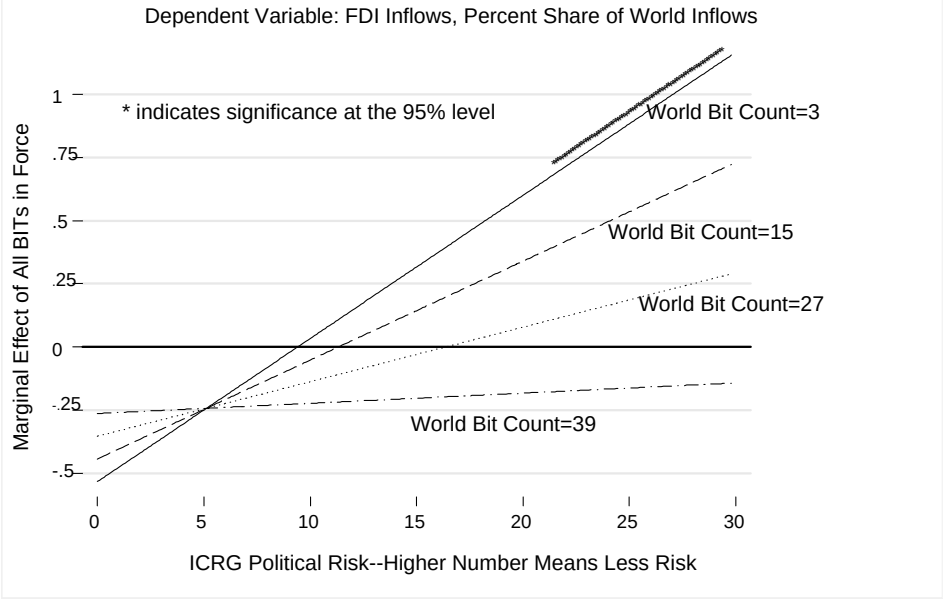
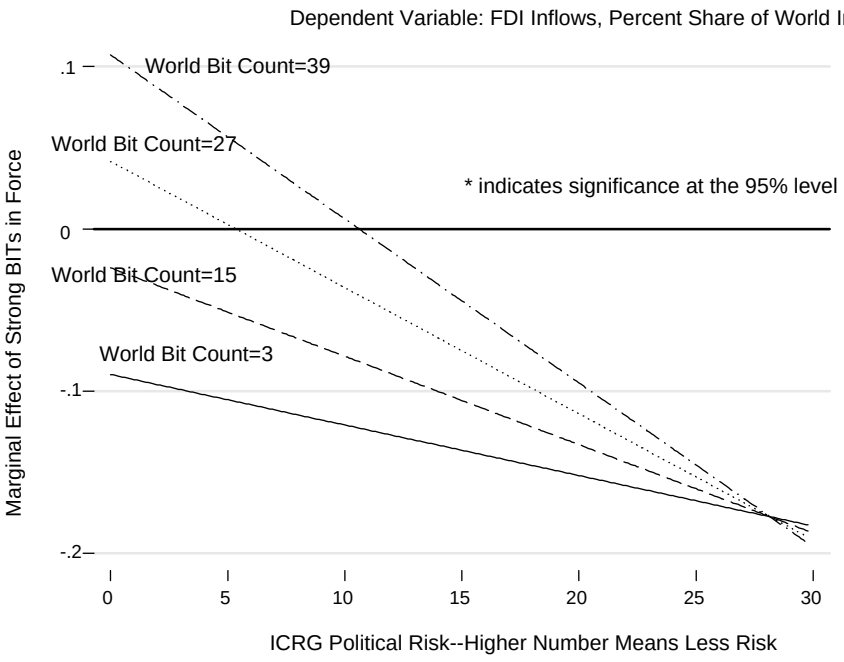


Figure 5.26: Marginal Effect of <u>Strong</u> BITs on FDI Share as Political Risk and Weighted World Strong BIT Count Change



For the sake of completeness I have reproduced below the results of the three-way interaction analysis using FDI penetration, rather than FDI share, as the dependent variable. Recall that the additive model of FDI penetration in Table 5.3 was the most successful of the three additive models, and it is worth considering whether changing our metric of FDI success in the interactive context will again substantively affect the conclusions we can draw about the effectiveness of BITs. Figures 5.27 and 5.28 illustrate the results from the interaction of the host state's aggregated BIT count, the Polity IV democracy variable, and the world strong BIT count. Figures 5.29 and 5.30 repeated the exercise using the ICRG political risk variable. Figures 5.27 and 5.29 use the host state's aggregated count of BITs, while Figures 5.28 and 5.30use the strong BIT variable.

Figure 5.27: Marginal Effect of <u>All</u> BITs on FDI Penetration as Democracy and Weighted World Strong BIT Count Change

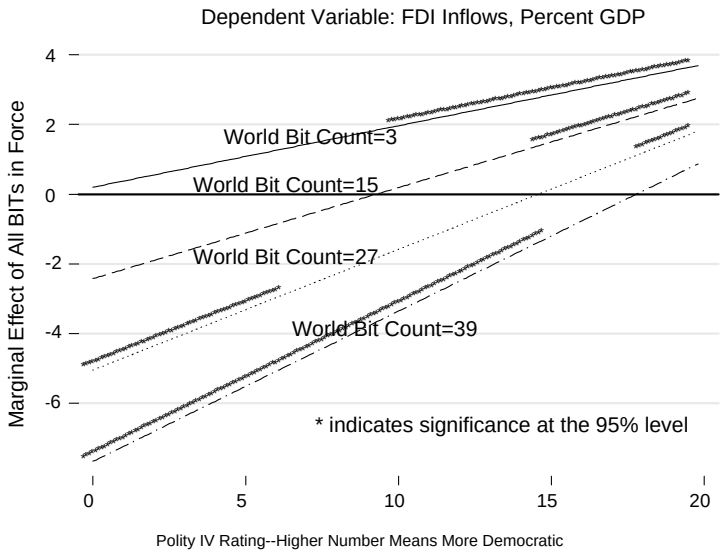
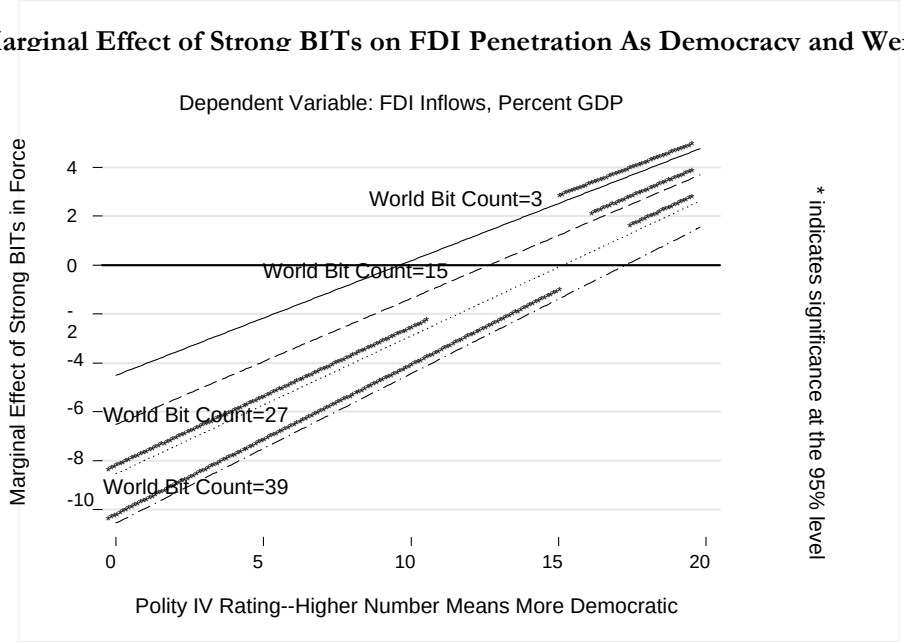


Figure 5.28: Marginal Effect of Strong BITs on FDI Penetration As Democracy and Weighted



As the results from the additive model would perhaps lead us to predict, using FDI penetration as the dependent variable significantly improves results in terms of finding statistically significant effects. Figures 5.27 and 5.28 show that BITs have statistically significant effects on FDI penetration at a wide range of values of democracy and of world strong BITs in force. Importantly for my theory, however, note that as the world count of BITs increases (e.g. as we move from the upper, solid line representing only three weighted, strong world BITs in force, to the bottom, dotted-dashed line indicated 39 weighted, strong world BITs in force), the estimated positive marginal effects of BITs on FDI penetration decline. In short, as more BITs enter into force worldwide, we can expect a host state's decision to enter into additional BITs to be of declining use in attracting more FDI. It is especially curious to note that at low levels of democracy, the predicted marginal effect of BITs on FDI penetration is actually *negative*. Only at the highest levels of democracy does the model suggest that BITs might have statistically significant, positive effects on FDI penetration. Even more discouragingly, the dotted-dashed lines suggest that at current world BIT levels, the marginal effect of BITs on FDI penetration is *never* statistically significant and positive.

Figure 5.29: Marginal Effect of <u>All</u> BITs on FDI Penetration as Political Risk and Weighted World Strong BIT Count Change

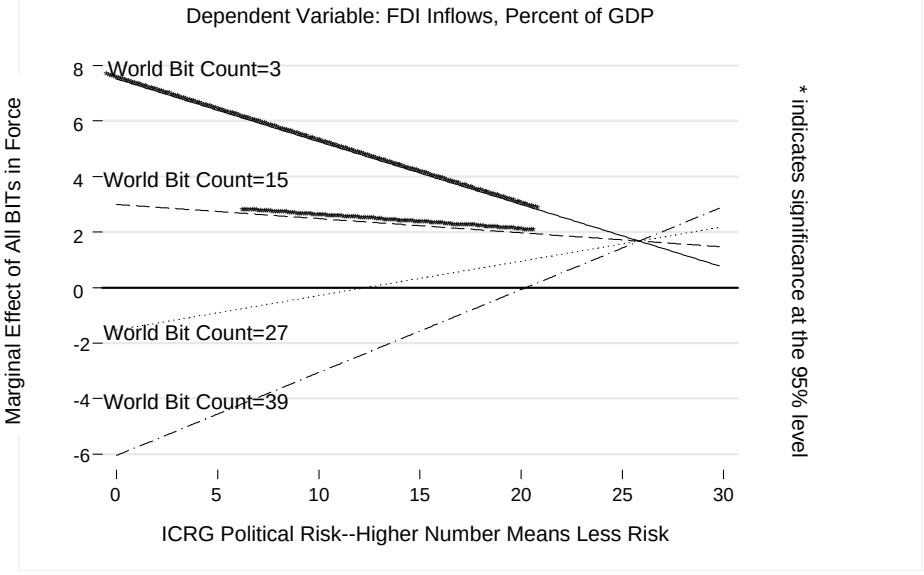
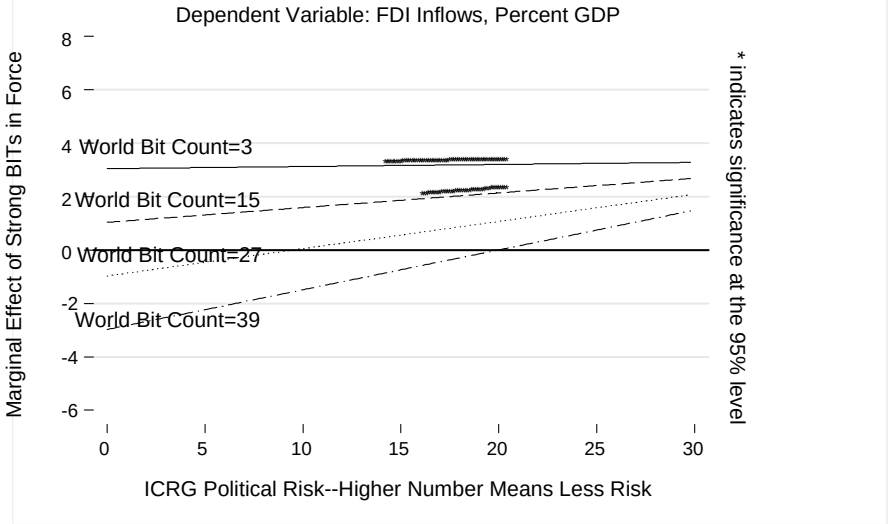


Figure 5.30: Marginal Effect of <u>Strong</u> BITs on FDI Penetration as Political Risk and Weighted World Strong BIT Count Change



Using the ICRG political risk variable in the three-way interaction term produces roughly similar results. Again, we see very strong evidence that as the world count of strong BITs in force increases, the

estimated marginal effectiveness BITs decreases, at least across most ranges of political risk. Furthermore, there is no evidence that the marginal effectiveness of BITs is statistically significant and positive at current world levels of BITs. Figures 5.29 and 5.30 indicate that BITs have a significant marginal effect on FDI penetration only at very low and moderately low levels of world BITs, and only at limited levels of political risk.

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[1] *See generally* HENRY CATTAN, THE LAW OF OIL CONCESSIONS IN THE MIDDLE EAST AND NORTH AFRICA Ch. VI (1967).

[2] For example, Article 9 of Côte d'Ivoire's 1959 investment law requires that all foreign investments benefit from an "establishment agreement" that "will set and guarantee the conditions of operations from which of the approved [foreign] enterprise will benefit." Article 10 of that law provides that "the resolution of disputes resulting from the application of provisions of an establishment agreement and the eventual determination of any indemnity owed because of a breach of engagements undertaken will be governed by an arbitral procedure which will be set out in each agreement."

[3] For example, UNCTAD reports that Peru "has concluded over 400" state-investor contracts, and that the practice of extending substantive and procedural promises to investors through investment-specific agreements "may be increase[ing]". UNCTAD, Issues related to international agreements: Investor-State disputes and policy implications 16 n.9, TD/B/COM.2/62.

[4] Fatorous suggests that by the early 1960s, investor-state arbitration clauses were "frequently included in agreements between states and foreign nationals or companies…usually describe[ing] in detail the procedures to be followed in case of dispute." A.A. FATOUROS, GOVERNMENT GUARANTEES TO FOREIGN INVESTORS 187 (1962).

[5] European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 1, Mar. 20, 1952, art. 1, 213 U.N.T.S. 262 ("Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law"). For a discussion of international cases brought under Protocol 1, Article 1, see Jon A. Staley, *Keeping Big Brother out of Our Backyard: Regulatory Takings as Defined in International Law and Compared to American Fifth Amendment Jurisprudence*, 15 EMORY J. INT'L L. REV. 349, 381-380 (2001).

[6] The OECD Declaration and Decisions on International Investment and Multinational Enterprises commit adhering states to provide national treatment to each other's foreign investors. Mexico, Korea, the Czech and Slovak Republics, Poland, Hungary, and Turkey, all members of the OECD, have signed on, as have a number of non-OECD developing countries, including Argentina, Brazil and Chile. OECD members have also adhered to "codes" of "Liberalisation of Capital Movements" and of "Liberalisation of Current Invisible Operations." The codes "constitute legally binding rules, stipulating progressive, non-discriminatory liberalisation of capital movements, the right of establishment and current invisible transactions (mostly services)." Compliance is encouraged through what the OECD calls "peer pressure exercised through policy reviews and country examinations to encourage unilateral rather than negotiated liberalization." The quote is from the OECD website, www.oecd.org/document/63/0,2340,en_2649_34887_1826559_1_1_1_1,00.html.

[7] P.T. MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 514-18 (1995).

[8] *See* Charles Lipson, *The Development of Expropriation Insurance: The Role of Corporate Preferences and State Initiatives*, 32 INT'L ORG. 351 (1978).

[9] *See, e.g.*, A.A. Fatouros, *The Quest for Legal Security of Foreign Investments, Latest Developments*, 17 RUTGERS L. REV. 257, 268-69 (1963) (discussing the "great number of statutes relating to the regulation and encouragement of foreign investments" that came into effect in the developing world in the early 1960s).

[10] FRANCOIS J. LOMBARD, THE FOREIGN INVESTMENT SCREENING PROCESS IN LDCS: THE CASE OF COLOMBIA, 1967-1975 p.126 (1979).

[11] FRANKLIN TUGWELL, THE POLITICS OF OIL IN VENEZUELA 152-53 (1975).

[12] RICHARD D. ROBINSON, NATIONAL CONTROL OF FOREIGN BUSINESS ENTRY: A SURVEY OF FIFTEEN COUNTRIES 323-339 (1976).

[13] William A. Stoever, *Attempting to resolve the attraction-aversion dilemma: a study of FDI policy in the Republic of Korea*, 11 TRANSNATIONAL CORP. 49 (2002).

[14] Elizabeth Asiedu & Donald Lien, *Capital Controls and Foreign Direct Investment*, 32 WORLD DEVELOPMENT 479 (2004).

[15] *See, e.g.*, Len J. Trevino et al., *Market Reform and FDI in Latin America: an empirical evaluation*, 11 TRANSNATIONAL CORP. 29 (2002).

[16]The World Bank's privatization database is available at http://rru.worldbank.org/privatization.

[17] Nathan M. Jensen, *Democratic Governance and Multinational Corporations: Political Regimes and Inflows of Foreign Direct Investment.* 57 INT'L ORGANIZATION 587 (2003); Quan Li, *Democracy, Autocracy, and Tax Incentives to Foreign Direct Investors: A Cross-National Analysis*, 68 J. POL. 62 (2006).

[18] Li, *supra* note 17, at 64.

[19] Implemented as the -xtserial- command in Stata.

[20] Rerunning the models using the date of BIT signature rather than the date of entry in force produced results substantively similar to those presented in Models I and II: all BIT variables remained statistically insignificant. Using the date of signature in Model III caused the strong BIT variable to fall out of significance (at just over the 0.10 level); the other BIT variables remained substantively unaffected.

[21] Substituting FDI inflows as a percent of world FDI inflows (FDI share) for the dependent variable in the interactive models caused the reported results to consistently fail to obtain conventional levels of statistical significance across all levels of political risk. In other words, attempting to explain FDI share rather than FDI penetration in an interactive model provides very little, if any, evidence that BITs *of any type* have statistically significant marginal effects on foreign investment decisions.

[22] *See generally* Thomas Brambor et al., *Understanding Interaction Models: Improving Empirical Analysis.* 14 POL. ANALYSIS 63 (2005).

CHAPTER SIX

CONCLUDING OBSERVATIONS

In this concluding chapter I offer a brief summary of the ideas, arguments, and analyses presented above, highlight a number of weaknesses, and suggest ways in which the research can be improved and supplemented in the near-term future.

At the most basic level I have argued that formal legal institutions are worthy of theoretical and empirical study by political scientists. The formal rules of the game—and particularly law, whether primarily international or domestic in terms of process of origin or of content—certainly structures international actors' expectations about how other actors will respond to their own moves and decisions, and by shaping their expectations influences their own behavior. In this sense, international "law" is not fundamentally different from the broader class of international "regimes" or "institutions" that have pre-occupied international relations for many years. My contribution, I hope, is to push scholars a bit further away from the rather facile point that "international law matters" to consider, with more subtlety and in more detail, the conditions under which international law might matter, and how much it might matter.

In this general vein of inquiry Chapter Two made two important points. First, that international law, and particularly bilateral investment treaties are most likely to matter in the sense of meaningfully influencing investor expectations where the treaties contain guaranteed access to effective dispute settlement. It is important to emphasize that this is the case not just because access to dispute settlement allows for reliable "enforcement" of the law, but because dispute settlement, and particularly authoritative, neutral adjudication allows for the clarification, and indeed, often the *making*, of

international legal obligation. The most important implication of this basic point for empirical scholars of investment treaties is that not all treaties are created equal. We as analysts must be particularly sensitive to the ways in which dispute settlement provisions differ among the treaties, just as must foreign investors who expect the treaties to protect their investments. The secondary point of Chapter Two is also important. It is that scholars of the formal rules of the international investment game must be more sensitive than they have been to alternative legal and policy instruments that serve the same (or closely similar) functions as the rules of primary interest. Here the point is to force analysts to consider meaningful policy alternatives—investment insurance as a substitute for a BIT; an investment contract as a substitute for investment insurance, and so on. Functionalist rationalizations of a particular class of policy instruments tend to lead analysts to assume, often wrongly, that the particular policy of focus is the best, or the only, meaningful way of resolving or addressing a particular problem. Hence the unjustified tendency to analyze BITs as if they are the only meaningful law-based way of credibly committing to treat investors fairly. I hope to have shown that BITs are hardly an inevitable solution to problems of credible commitment or of obsolescing bargain. They may not even be the best. A very strong argument can be made that BITs inject too much rigidity into the international investment law regime by making it difficult for host states to adjust their investment policies—e.g. the terms of the deal offered to investors—in response to changing political and economic circumstances. For many years, investors relied primarily on investment contracts to secure their interests. Returning, at least in part, to a true bargaining regime, in which particular deal are struck on a case-by-case basis would in my view better allow developing countries to adjust and manage their exposure to international arbitration and to the policy inflexibility that it can induce, and to ensure that potentially very costly remedial promises are extended only to those investors for whom the promises are an essential precondition of the decision to invest.

Chapter Three situated itself within a growing literature in comparative politics addressing the role that political partisanship plays in shaping state's policy choices. I argued that partisanship can be

expected to influence *international* policy decisions just as it influences purely domestic ones, and that it should do so in predictable and relatively stable ways. My principal theoretical contribution was to attempt to tie this partisanship hypothesis to an explanation grounded in the ideational literature of the 1990s. The empirical results were promisingly but not perfectly confirmatory. Where the policy decision is most meaningful (in this case, where the decision is whether to enter into a BIT containing strong dispute settlement provisions), we have evidence of fairly strong empirical relationships. Most surprising, however, is that the relationships are apparently not stable over time, and that, at least since the late 1980s and early 1990s, the relationship is the opposite of what many would have suspected. Left governments are now, but have not always been, more likely than right governments to enter into strong BITs. This suggests that what it means to be "on the left" or "on the right" is not as fixed in stone as some might expect.

Chapter Three's analysis suffers from at least two important weaknesses, however. The first is data-related, the second theoretical. In particular, the quality of the World Bank data on government partisanship is arguably not terribly high. For example, in many cases the coders appear to have relied principally on official party labels to classify parties as being on the left or right, even though party labels are often misleading. The better approach, though it is also one that is exceedingly labor-intensive, is to classify political parties on the basis of individualized case research by regional or country specialists. It is also worth noting that the World Bank data does not tap the degree to which a governing party is meaningfully on the left or on the right, but rather assumes that all left-governing parties are equally left, and that all right-governing parties are equally right. John Stephens and Evelyne Huber are currently compiling a more rigorously constructed and researched cross-national dataset of government partisanship that, unfortunately, was not available for use in the present study.

More serious is my failure to provide a more explicit theory of *why* politicians of certain stripes might hold, and hold to, particular policy ideas. This is perhaps the most fruitful area for future

theoretical development. More work needs to be done, for example, to explore the links between domestic political constituents—voters or other politically relevant members of the selectorate—and *their* ideas of where their interests stand and the ideologies (and ultimately policy choices) of the leaders that they select. One means of inquiry might be to examine in more detail the likely economic interests in FDI policy of a given party's constituents on a factoral or sectoral basis, as these sorts of models have been used with some success to explain international trade policy choices. Fordham and McKeown's recent examination of the influence of interest groups on trade policy in the United States, which controls separately for the effects of party and ideology and the economic interests of constituents and interest groups, provides a potential model that could potentially and with substantial work be extended to a cross-national comparative examination of the determinants of FDI policy.[1]

Chapters Four and Five analyzed the effects of BITs on FDI inflows. My basic argument was that if BITs should be expected to have much of an effect on investors' expectations about the security of their investments against adverse host-state changes in policy, that effect should be most readily observed where the BITs in question were accompanied by strong dispute settlement provisions. My basic contribution to the relevant literature is to provide the first analysis of BITs that distinguishes the treaties on the basis of dispute settlement provisions and which control for a wide variety of theoretically relevant BIT alternatives. I showed in Chapter Four that Neumayer and Spess's supposedly robust main finding—that signed, undifferentiated BITs are positively and significantly associated with increased FDI shares across all levels of political risk—does not hold up to justifiable changes in model specification and estimation strategy. In the face of those changes, their results fall largely into statistical insignificance. In particular, BITs appear to be rather ineffective tools in the "competition for capital" that motivates Neumayer and Spess's theory and other recent empirical work on BITs once we control for the number of BITs in force worldwide. There are compelling theoretical reasons, and now compelling empirical reasons, to suspect that as more and more states sign strong BITs, newcomers to

the competition will find their new treaties to be far less effective at diverting competitive capital to their shores than did those who joined the BIT party early on.

But I do not want to exaggerate the extent to which I have shown that "international law matters". Once we control for BIT alternatives, such as use of investment insurance, privatization programs, and domestic law capital controls, it proved very difficult to show that strong BITs had a statistically significant and positive effect on FDI inflows. This is surprising because, as I have said, it is *these* BITs that have the greatest theoretical potential to improve investor confidence and to induce greater FDI flows. I did report some modestly positive results: non-weak BITs do appear to be effective at increasing *FDI penetration*, at least in an additive model. This finding suggests that while BITs might not be all that effective in the "competition for capital," they may be effective at promoting non-competitive, market-seeking foreign investment. To the extent that this limited result is trustworthy, it suggests that reputational concerns alone are insufficient to ensure investor perceptions of compliance with international legal obligations. If reputation were an important inducement to comply with international law, then we would expect weak BITs to have similar effects on investor confidence or interest (indicated by FDI inflows) as strong BITs. Instead, we find that where BITs do seem to "matter," it is only where they contain important references to international arbitration to enforce treaty obligations. In other words, if developing countries want BITs to "work", they must be willing to except the potentially significant sovereignty costs of agreeing to litigate investment disputes over the application and meaning of vague principles of law before arbitral tribunals.

The inconsistency in the additive results between different metrics of FDI "success" is admittedly difficult to explain, though it does suggest that BIT analysts should be very careful to examine the sensitivity of their results to the use of different metrics. One possible explanation for the inconsistency is that success at attracting non-competetive market-oriented investments is perhaps better reflected in the FDI penetration variable, and that those kinds of investments tend to be more asset-specific, thus

more vulnerable to the problem of the "obsolescing bargain" then investments in ultra-competitive export-oriented sectors like light manufacturing. Investors in these competitive sectors may be expected to care much less about the presence or absence of a BIT because BITs provide them with largely unnecessary protections. If this is indeed the case, then it might not be particularly surprising that BITs don't help increase FDI share very much, because competitive-sector investors don't place much inherent value on BITs. If policies prove to be unstable, or if the host state attempts to renegotiate the terms of operation, the competitive-sector investor can credibly threaten to exit for more favorable countries. These conclusions and speculations must be tempered, however, by the results of the interactive analyses presented in Chapter Five, which suggested that at current worldwide levels of BITs the treaties, even the strong ones, can *not* be said to have statistically significant, positive effects on FDI inflows measured as a percent of host state GDP, or to have significant positive effects and many observed levels of political risk.

In this sense my fundamental theoretical claim—that under certain circumstances international should "matter"—has not been all that strongly confirmed. Is the problem one of theory or one of data? The best answer is also not particularly satisfying. That answer is that more work remains to be done on the subject. In particular, statistical models of the type presented here are notoriously bad at shedding light on the micro-processes that underlie the theories at hand. For example, an unstated assumption of Neumayer and Spess's theory of BITs is that foreign investors notice the presence or absence of the treaties at the early stages of the investment decision-making process, and that the presence or absence of a treaty will in many cases definitively decide the question of whether or not to sink the investment. My own addition to the theory has assumed that investors not only notice the treaties, but take into account differences in the *content* of the treaties, and in a fairly sophisticated way at that. The problem for these assumptions—and they are admittedly big ones—is that there is little to no systematic and reasonably direct evidence that investors have had any significant knowledge of the treaties, or of their theoretical effects on policy stability. To my knowledge their have been no major surveys of the extent to which the

presence or absence of a BIT actually enters into foreign investment decisions. But there is suggestive if largely anecdotal evidence that it historically investors have not paid much attention to the treaties. For example, a small survey of business executives conducted in 1976 found that only 16 percent of respondents were "familiar" with ICSID, that only one quarter of that 16 percent felt that ICSID provided "adequate safeguards." These results led the authors to conclude that ICSID needed to mount a major promotional campaign.[2] In my view it is highly unlikely that investor awareness or appreciation of specific BITs was any higher in this earlier era. Perhaps even more revealing is the title of a recent practitioner-oriented publication, "Arbitration under Bilateral Investment Treaties: An often overlooked tool," which suggests that additional promotional efforts may still be needed.[3] And while anecdotes should always be approached with extreme caution, my own informal conversations with practicing international lawyers involved on the "deal-making" side of international investment suggest that BITs rarely enter into the investment-making process in any concrete and significant way, and that far more important are rather mundane considerations relating to what might be called the "ease of doing business" and of "getting the deal done." Along the same lines, an analyst at a major state-sponsored investment insurance agency told me (under condition that I not divulge his name or agency) that the impression of his agency colleagues was that, with the possible exception of investors in the oil and gas sectors, foreign investors are often "unaware of or unfamiliar with BITs and their existence or lack thereof in their countries of interest." This is somewhat ironic because investors in the oil and gas industry are also the most capable of inserting BIT-like provisions in investment contracts, since in almost all cases actual negotiations with host states are a necessary precondition to their investments, and because there is a long history of including arbitration, choice-of-law, and law-stability clauses in those contracts.

In brief, while my own contribution to the debates has largely been one of large-n, quantitative analysis, there is a great need to engage in the sort qualitative "process tracing" of the sort advocated by George and McKeown.[4] There is tremendous room to make a meaningful contribution to the BIT

debate by conducting social scientifically valid surveys or case studies of the investment decision-making process and the extent to which, and ways in which, considerations of international law might or might not enter into it. In other words, if the argument is that foreign investors theoretically should care about BITs and dispute settlement provisions, then why not *ask them* if they care about them? The first wave of modern research on international business-government relations that emerged out Harvard Business School in the late 1960s and early 1970s was explicitly empirical and explicitly qualitative, in large part because business school professors had access to and were comfortable interacting with business leaders, and because computing resources and data availability were such that complex statistical models were difficult to build and to test.[5] Future research would do very well to return to the methods of these earlier scholars.

This is my own intent. To follow up the present project, and over the long-term, I plan on beginning a complementary project that will combine surveys of the general counsel of Fortune-500 companies with structured interviews with key foreign-investment decision-makers in multinational corporations. The goal is to identify whether, and if so where and how, knowledge of international law enters into the foreign-investment decision-making process.

In the interim, what should developing countries anxious to attract additional FDI do? My results suggest that the best course of action is one of caution. Developing countries would be well-advised to refrain from extending their commitment to investor-initiated, treaty-based arbitration by insisting that new BITs or their equivalents shall not contain broad-based arbitral pre-consents and by refusing to sign or enter into treaties that do. This is not so preposterous a proposition. Australia recently and successfully convinced the United States to significantly weaken the international arbitration provisions of the investment chapter of the Australia-United States Free Trade Agreement.[6] If a particular investor truly cares about guaranteed access to international arbitration, then let the investor

ask for it. As I have argued above, BITs are not necessary for host states to credibly commit to particular terms of bargain.

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[1] Benjamin O. Fordham & Timothy J. McKeown, *Selection and Influence: Interest Groups and Congressional Voting on Trade Policy*, 57 INT'L ORG. 519 (2003).

[2] John K. Ryans, Jr. & James C. Baker, *The International Center for Settlement of Investment Disputes (ICSID)*, 10 J. WORLD TRADE L. 65, 70 (1976).

[3] Freyer D.H., Garfinkel B.H., Gharavi H.G., *Arbitration under Bilateral Investment Teaties: An often overlooked tool,* MEALY'S International Report. May 1998.

[4] Alexander George & Timothy McKeown, "Case Studies and Theories of Organizational Decision Making," *in* 2 ADVANCES IN INFORMATION PROCESSING IN ORGANIZATIONS 21 (Robert Coulam and Richard Smith, eds. 1985).

[5] This literature is reviewed in Jean Boddewyn, "Early U.S. business-school literature (1960-1975) on international business-government relations: its twenty-first century relevance", in INTERNATIONAL BUSINESS AND GOVERNMENT RELATIONS IN THE 21ST CENTURY 23 (Grosse, ed. 2006).

[6] *See* Ann Capling & Kim Richard Nossal, *Blowback: Investor–State Dispute Mechanisms in International Trade Agreements.* 19 GOVERNANCE 151 (2006).

APPENDIX

This Appendix lists all of the BITs used in the empirical analyses presented above, disaggregated by investor-state dispute settlement provisions. The Appendix does not include BITs that have been signed but which, as of 2002, had not yet entered into force. "No." simply counts each capital-exporting state's BITs, in chronological order by date of signature. "Type" indicates whether the listed treaty is a true "BIT", meaning that it is "bilateral" and deals exclusively with "investment", or whether it is a broader trade agreement that contains BIT-like provisions (a treaty of "Friendship, Commerce, or Navigation," or "FCN", or a "free trade agreement," or "FTA), or whether it is a BIT-equivalent treaty in some other form that is described, where appropriate, in an associated footnote. "Signed" and "In Force" list the dates of signature and entry into force. For the most part these dates are identical to those reported by UNCTAD in its various lists of BITs. However, where the UNCTAD date conflicts with more official sources, such as the face of the particular treaty itself, or with the date provided in a national government legislative "gazette" or similar authoritative source, I have made the appropriate correction.

"Pre-Consent" indicates the type of investor-state dispute settlement provision contained in the treaty. The classification scheme is described in more detail in the body of this dissertation. To briefly summarize, a "comprehensive" pre-consent is a consent to arbitrate a wide range of investment-related disputes at the investor's initiative. A "partial" pre-consent is a consent that only applies to a limited class of investment disputes, generally involving issues of expropriation. A "promissory" pre-consent is a consent to investor-initiated arbitration that is incomplete in the sense that an arbitral tribunal will be more likely than note to require some *additional* manifestation of consent on behalf of the interested host state before the tribunal will exercise jurisdiction. And finally, "none" indicates that the treaty does not

contain any of the above three types of pre-consents. For the most part this means that the treaty does not so much as mention the possibility of investor-state dispute settlement. I have also listed the particular arbitral facilities that the investment treaties allow the investor to access at his own initiative. "ICSID" refers to arbitration under the normal rules of the International Centre for the Settlement of Investment Disputes; "ad hoc" refers to arbitration under rules that are special to the treaty or to the particular dispute, and not supplied by an institutionalized arbitral apparatus; "UNCITRAL" refers to arbitration pursuant to the ad hoc rules codified by the United Nations Conference on Trade and Development; "ICC" refers to arbitration under the rules of the International Chamber of Commerce; "SCC" refers to arbitration under the rules of the Stockholm Chamber of Commerce; "AF" refers to arbitration under ICSID's Additional Facility, which are applicable when a state party to an arbitration is not a member of the ICSID Convention proper; and "Other" refers to all other arbitration rules or facilities, including, for example, the Cairo Chamber of Commerce. In some cases a BIT will refer to a particular arbitral facility or set of model rules—say, the UNICTRAL rules—but then specify a small number of individualized, ad hoc rules that shall apply to particular matters. In those cases, where an institutionalized or model set of rules are to apply to most issues that will arise, I have coded the treaty as calling for institutional or model-rule arbitration rather than ad hoc arbitration.

In some cases a treaty will contain a pre-consent to ICSID arbitration, but the developing country party to the treaty will not have signed and ratified the ICSID Convention itself. Under the terms of the ICSID Convention, only states that have joined that treaty may use its arbitral facilities. Where a BIT pre-consents to ICSID Arbitration, but where the developing-country Contracting Party is not a member of ICSID, I have noted this fact by placing [brackets] around the [X] in the ICSID column of the tables. Where a treaty contains a pre-consent *only* to ICSID arbitration, but where the investor does not have access to ICSID because the developing country has not ratified the ICSID Convention, I have counted the treaty as *not* containing a pre-consent to arbitration for the purposes of the statistical analyses above. I have indicated these special cases in footnotes in the tables below.

The ambitious analyst may be tempted to explore whether references to particular kinds of arbitration render treaties measurably more or less effective at attracting additional foreign direct investment. For instance, it seems clear that ICSID arbitration is inherently more investor-friendly than ad hoc arbitration, because ICSID awards are more secure from domestic court review. I would caution modesty in this regard. In my view it is already risks stretching credulity to assume, as I have done above, that investors are aware enough of the legal subtleties of various treaties to notice and to take into account differences in investor-state dispute settlement provisions writ large. To argue that investors are aware enough at the pre-investment stage to take into account differences in the forum of arbitration offered to them, and to do so in a way that will manifest itself in rather base statistical analysis, crosses the line dividing plausibility and impossibility. My working assumption, then, is that it is enough that an investment treaty provide a pre-consent to *some kind* of international arbitration, initiatable at the whim of the investor.

I have assumed throughout that Russia is legally bound by Soviet Union BITs, an assumption supported by arbitral practice and investor perceptions. A more difficult issue is whether Soviet-era BITs bind the non-Russian members of the ex-Soviet Union. The Alma Alta Declaration establishing the Commonwealth of Independent States seems to suggest that Soviet BITs might remain relevant for non-Russian members of the CIS by suggesting a general intent to succeed to the Soviet Union's international legal obligations.[2] However, I am aware of no commentary or arbitral decision advocating the application of Soviet BITs to CIS members outside of the Russian case. For that reason I have assumed in the tables below and in the statistical analyses above that non-Russian CIS members are not and have not been legally bound by Soviet-era BITs.

[2] The Alma Ata Declaration can be found at 31 ILM 147 (1992).

The disintegration of Yugoslavia poses more serious difficulties. I have assumed throughout the analysis that Yugoslavia's pre-breakup BITs continued to bind Serbia, as Serbia was clearly considered a successor state to Yugoslavia by most third parties. It is more difficult to determine definitively whether non-Serbian constituent parts of Yugoslavia should be coded as being bound by Yugoslav BITs. In some cases subsequent BITs indicate that they replace an earlier Yugoslavia treaty. We may take as an indication that the Yugoslavia BIT was considered to legally bind the particular country up until the entry into force of the new treaty. For example, Austria's post-breakup BITs with Bosnia, Croatia, Macedonia, and Slovenia all indicate that they replace an earlier Austria-Yugoslavia BIT as to those countries. In other cases later BITs don't mention a potentially relevant Yugoslav BIT, suggesting that the early treaty might not have been perceived as binding the constituent part. Given the uncertainty I think it best to consider Yugoslav BITs as binding only Serbia, whether as a legal "fact" or as a perception among investors. In any event, and given the lack of relevant economic data on the ex-Yugoslav countries across the period of study, these questions are somewhat academic, as the countries tend to drop from most statistical analyses.

Finally, I have not included in the tables (or in the analyses above) BITs involving Taiwan or Hong Kong, neither of which is, or is universally understood to be, an independent, sovereign state.

Australian BITs In Force, Through 2002

No.	Type	Host	Signed	In Force	Pre-Consent	Designated Arbitral Forum/Fora						
						ICSID	Ad Hoc	UNCITRAL	ICC	SCC	AF	Other
1	BIT	**China**	11-Jul-88	11-Jul-88	Partial		X					
2	BIT	**Papua New Guinea**[3]	3-Sep-90	20-Oct-91	Promissory		[X]					
3	BIT	**Vietnam**	5-Mar-91	11-Sep-91	Comprehensive		X					
4	BIT	**Poland**	7-May-91	27-Mar-92	Partial		X					
5	BIT	**Hungary**	15-Aug-91	10-May-92	Promissory		[X]					
6	BIT	**Indonesia**	17-Nov-92	29-Jul-93	Promissory		[X]					
7	BIT	**Romania**	21-Jun-93	22-Apr-94	Promissory		[X]					
8	BIT	**Czech Republic**	30-Sep-93	29-Jun-94	Promissory		[X]					
9	BIT	**Laos**	6-Apr-94	8-Apr-95	Comprehensive		X					
10	BIT	**Philippines**	25-Jan-95	8-Dec-95	Promissory		[X]					
11	BIT	**Argentina**	23-Aug-95	11-Jan-97	Comprehensive	X		X				
12	BIT	**Peru**	7-Dec-95	2-Feb-97	Promissory		[X]					
13	BIT	**Chile**	9-Jul-96	18-Nov-99	Comprehensive	X		X				
14	BIT	**Pakistan**	7-Feb-98	14-Oct-98	Promissory		[X]					
15	BIT	**Lithuania**	24-Nov-98	10-May-02	Promissory		[X]					
16	BIT	**India**[4]	26-Feb-99	4-May-00	Comprehensive			X				
17	BIT	**Egypt**	3-May-01	5-Sep-02	Promissory		[X]					
18	BIT	**Uruguay**	3-Sep-01	12-Dec-02	Comprehensive		X					

[3] Australia's "promissory" BITs contain apparent pre-consents to ad hoc arbitration, but only if both Contracting Parties are *not* members of ICSID. Where both Contracting Parties *are* members of ICSID, the ad hoc option becomes unavailable under the terms of the treaty, and arbitrations are directed to ICSID. But—and here is the subtlety—these treaties require an additional manifestation of host state consent for an ICSID tribunal to exercise jurisdiction, a fact which renders an otherwise "comprehensive" pre-consent to ad hoc arbitration a promissory consent to ICSID arbitration.

[4] India's pre-consent to arbitration contains more ambiguity than most, but is probably presents a valid basis for a tribunal to assume jurisdiction.

Austrian BITs in Force, Through 2002

No.	Type	Host	Signed	In Force	Pre-Consent	Designated Arbitral Forum/Fora						
						ICSID	Ad Hoc	UNCITRAL	ICC	SCC	AF	Other
1	BIT	**Romania**	30-Sep-76	8-Nov-77	Partial			X				
2	BIT	**Malaysia**	12-Apr-85	1-Jan-87	Comprehensive	X						
3	BIT	**China**	12-Sep-85	11-Oct-86	Partial		X					
4	BIT	**Hungary**	26-May-88	1-Sep-89	Partial	X						
5	BIT	**Turkey**	16-Sep-88	1-Jan-92	Comprehensive	X						
6	BIT	**Poland**	14-Nov-88	1-Nov-89	Comprehensive	[X]	X					
7	BIT	**Yugoslavia**	25-Oct-89	1-Jun-91	Comprehensive	X						
8	BIT	**Russia**	8-Feb-90	1-Sep-91	Partial			X		X		
9	BIT	**Czech Republic**	15-Oct-90	1-Oct-91	Partial			X				
10	BIT	**Slovakia**	15-Oct-90	1-Oct-91	Partial			X				
11	BIT	**Korea**	14-Mar-91	1-Nov-91	Comprehensive	X						
12	BIT	**Cape Verde**	3-Sep-91	1-Apr-93	Comprehensive			X				
13	BIT	**Serbia**[5]	1-Jan-92	1-Jan-92	[Comprehensive]	[X]						
14	BIT	**Argentina**	7-Aug-92	1-Jan-95	Comprehensive	X		X				
15	BIT	**Morocco**	2-Nov-92	1-Jul-95	Comprehensive	X						
16	BIT	**Albania**	18-Mar-93	1-Aug-95	Comprehensive	X						
17	BIT	**Paraguay**	13-Aug-93	1-Jan-00	Comprehensive	X						
18	BIT	**Estonia**	16-May-94	1-Oct-95	Comprehensive	X		X				
19	BIT	**Latvia**	17-Nov-94	1-May-96	Comprehensive	X		X				
20	BIT	**Vietnam**	27-Mar-95	1-Oct-96	Comprehensive			X				
21	BIT	**Tunisia**	1-Jun-95	1-Jan-97	Comprehensive	X						
22	BIT	**Romania**	15-May-96	1-Jul-97	Comprehensive	X						
23	BIT	**Lithuania**	28-Jun-96	1-Jul-97	Comprehensive	X		X				
24	BIT	**Ukraine**	8-Nov-96	1-Dec-97	Comprehensive	X		X				
25	BIT	**Kuwait**	16-Nov-96	22-Sep-98	Comprehensive	X		X				
26	BIT	**South Africa**	28-Nov-96	1-Jan-98	Comprehensive	X		X			X	
27	BIT	**Bulgaria**	22-Jan-97	1-Nov-97	Comprehensive	X		X				
28	BIT	**Croatia**	19-Feb-97	1-Nov-99	Comprehensive	X		X				

[5] Serbia has not ratified the ICSID Convention, making the pre-consent to ICSID arbitration in the Yugoslav BIT ineffective as to Serbia.

29	BIT	**Bolivia**	4-Apr-97	1-Jul-02	Comprehensive	X		X				
30	BIT	**Chile**	8-Sep-97	17-Nov-00	Comprehensive	X		X				
31	BIT	**Mexico**	29-Jun-98	26-Mar-01	Comprehensive	X		X	X		X	
32	BIT	**India**	8-Nov-99	1-Mar-01	Comprehensive	X		X				
33	BIT	**Cuba**	19-May-00	25-Nov-01	Comprehensive	X		X	X			
34	BIT	**Uzbekistan**	2-Jun-00	18-Aug-01	Comprehensive	X		X	X		X	
35	BIT	**Azerbaijan**	4-Jul-00	28-May-01	Comprehensive	X		X	X		X	
36	BIT	**Bosnia**	2-Oct-00	20-Oct-02	Comprehensive	X		X	X		X	
37	BIT	**Bangladesh**	21-Dec-00	1-Dec-01	Comprehensive	X		X	X			
38	BIT	**Jordan**	23-Jan-01	25-Nov-01	Comprehensive	X		X	X			
39	BIT	**Slovenia**	7-Mar-01	1-Feb-02	Comprehensive	X		X	X			
40	BIT	**Macedonia**	28-Mar-01	14-Apr-02	Comprehensive	X		X	X		X	
41	BIT	**Egypt**	12-Apr-01	29-Apr-02	Comprehensive	X		X				X
42	BIT	**Lebanon**	1-May-01	30-Sep-02	Comprehensive	X		X	X		X	
43	BIT	**Belarus**	16-May-01	1-Jun-02	Comprehensive	X		X				
44	BIT	**Mongolia**	19-May-01	1-May-02	Comprehensive	X		X				
45	BIT	**Moldova**	6-Jun-01	18-Oct-01	Comprehensive	X		X				
46	BIT	**Belize**	17-Jul-01	1-Feb-02	Comprehensive	X		X	X		X	
47	BIT	**Serbia**	12-Oct-01	1-Aug-02	Comprehensive	[X]		X				

Belgian BITs in Force, Through 2002

No.	Type	Host	Signed	In Force	Pre-Consent	Designated Arbitral Forum/For a						
						ICSID	Ad Hoc	UNCITRAL	ICC	SCC	AF	Other
1	BIT	**Tunisia**	15-Jul-64	9-Mar-66	None							
2	BIT	**Morocco**	28-Apr-65	18-Oct-67	None							
3	BIT	**Indonesia**	15-Jan-70	17-Jun-72	Comprehensive	X						
4	BIT	**South Korea**	20-Dec-74	3-Sep-76	Comprehensive	X						
5	BIT	**Zaire**	28-Mar-76	1-Jan-77	None							
6	BIT	**Egypt**	28-Feb-77	20-Sep-78	Comprehensive	X						
7	BIT	**Romania**	8-May-78	1-May-80	Partial	X						
8	BIT	**Singapore**	17-Nov-78	27-Nov-80	Comprehensive	X						
9	BIT	**Cameroon**	27-Mar-80	1-Nov-81	Comprehensive	X						
10	BIT	**Malaysia**	22-Nov-79	8-Feb-82	Comprehensive	X						
11	BIT	**Sri Lanka**	5-Apr-82	26-Apr-84	Comprehensive	X						
12	BIT	**Rwanda**	2-Nov-83	1-Aug-85	Comprehensive	X						
13	BIT	**China**	4-Jun-84	5-Oct-86	Partial		X					
14	BIT	**Bangladesh**	22-May-81	14-Sep-87	Comprehensive	X						
15	BIT	**Hungary**	14-May-86	23-Sep-88	Partial	X			X	X		
16	BIT	**Turkey**	27-Aug-86	4-May-90	Comprehensive	X						
17	BIT	**Bulgaria**	25-Oct-88	29-May-91	Comprehensive			X				
18	BIT	**Poland**	19-May-87	2-Aug-91	Partial	X		X		X		
19	BIT	**Russia**	9-Feb-89	13-Oct-91	Partial			X		X		
20	BIT	**Algeria**	24-Apr-91	13-Feb-92	Comprehensive	X					X	
21	BIT	**Czech Rep.**	24-Apr-89	13-Feb-92	Partial			X				
22	BIT	**Slovakia**	24-Apr-89	13-Feb-92	Partial			X				
23	BIT	**Malta**	5-Mar-87	15-Jun-93	Comprehensive	X		X	X			
24	BIT	**Burundi**	13-Apr-89	12-Sep-93	Comprehensive	X						
25	BIT	**Mongolia**	3-Mar-92	28-Oct-93	Comprehensive	X						
26	BIT	**Argentina**	28-Jun-90	20-May-94	Comprehensive	X		X			X	
27	BIT	**Estonia**	24-Jan-96	11-Dec-96	Comprehensive	X			X	X		
28	BIT	**Latvia**	27-Mar-96	4-Apr-99	Comprehensive	X					X	
29	BIT	**Uruguay**	4-Nov-91	23-Apr-99	Comprehensive	X		X			X	
30	BIT	**Cyprus**	26-Feb-91	5-Jun-99	Comprehensive	X			X	X	X	

31	BIT	**Vietnam**	24-Jan-91	11-Jun-99	Comprehensive	X					X	
32	BIT	**Georgia**	23-Jun-93	3-Jul-99	Comprehensive	X			X	X	X	
33	BIT	**Chile**	15-Jul-92	5-Aug-99	Comprehensive	X						
34	BIT	**Lithuania**	15-Oct-97	6-Sep-99	Comprehensive	X		X	X	X		
35	BIT	**India**	31-Oct-97	8-Jan-01	Comprehensive			X				
36	BIT	**Ukraine**	20-May-96	27-Jan-01	Comprehensive	X		X	X	X	X	
37	BIT	**Kazakhstan**	16-Apr-98	6-Feb-01	Comprehensive	X		X			X	
38	BIT	**Uzbekistan**	17-Apr-98	6-Feb-01	Comprehensive	X		X	X	X	X	
39	BIT	**Romania**	4-Mar-96	9-Mar-01	Comprehensive	X						
40	BIT	**Slovenia**	1-Feb-99	14-Jan-02	Comprehensive	X		X				
41	BIT	**Moldova**	21-May-96	20-Apr-02	Comprehensive	X		X	X	X	X	
42	BIT	**Egypt**[6]	28-Feb-99	24-May-02	Promissory	X		X	X			X
43	BIT	**Morocco**	13-Apr-99	29-May-02	Comprehensive	X						
44	BIT	**Albania**	1-Feb-99	18-Oct-02	Comprehensive	X						
45	BIT	**Tunisia**	8-Jan-97	18-Oct-02	Comprehensive	X		X				
46	BIT	**Macedonia**	17-Feb-99	4-Nov-02	Comprehensive	X		X	X	X	X	
47	BIT	**El Salvador**	12-Oct-99	12-Nov-02	Comprehensive	X						

[6] The Belgium-Egypt BIT contains a potentially ambiguous pre-consent to arbitration in the official French version. The relevant language is that "*l'investisseur sera autorisé à soumettre le differend à l'arbitrage*", or, in my own translation, "the investor *will* be authorized to submit the dispute to arbitration." My own position is that the future tense of the verb "to be" (*être*, or, conjugated, *sera*) indicates that the consent is promissory. Egypt is certainly a sophisticated party to international investment law, and is capable of comprehending the formal legal implications of subtle differences in language. Note its involvement, on the losing end of things, in an early and important investment arbitration that involved, *inter alia*, the proper interpretation of its consent to arbitration contained in its foreign investment law. This is, of course, the well-known "Pyramids Case," *Southern Pacific Properties (Middle East) Ltd. [SPP] v. Arab Republic of Egypt*, reprinted in 22 I.L.M. 752 (1983).

Canadian BITs in Force, Through 2002[7]

No.	Type	Host	Signed	In Force	Pre-Consent	Designated Arbitral Fora						
						ICSID	Ad Hoc	UNCITRAL	ICC	SCC	AF	Other
1	BIT	**Russia**	20-Nov-89	27-Jun-91	Comprehensive			X				
2	BIT	**Poland**	26-Oct-90	22-Nov-90	Comprehensive			X				
3	BIT	**Czech Republic**	15-Nov-90	9-Mar-92	Comprehensive			X				
4	BIT	**Slovakia**	15-Nov-90	9-Mar-92	Comprehensive			X				
6	BIT	**Hungary**	3-Oct-91	21-Nov-93	Partial	[X]		X				
7	BIT	**Argentina**	5-Nov-91	29-Apr-93	Comprehensive			X				
8	FTA	**Mexico**	17-Dec-92	1-Jan-94	Comprehensive	[X]		X			X	
10	BIT	**Ukraine**	24-Oct-94	24-Jun-95	Comprehensive	[X]		X			X	
11	BIT	**Latvia**	26-Apr-95	27-Jul-95	Comprehensive	[X]		X			X	
12	BIT	**Trinidad-Tobago**	11-Sep-95	8-Jul-96	Comprehensive	[X]		X			X	
13	BIT	**Philippines**	10-Nov-95	1-Nov-96	Comprehensive	[X]		X			X	
15	BIT	**Romania**	17-Apr-96	11-Feb-97	Comprehensive	[X]		X			X	
16	BIT	**Ecuador**	29-Apr-96	6-Jun-97	Comprehensive	[X]		X			X	
17	BIT	**Barbados**	29-May-96	17-Jan-97	Comprehensive	[X]		X			X	
18	BIT	**Venezuela**	1-Jul-96	28-Jan-98	Comprehensive	[X]		X			X	
19	BIT	**Panama**	12-Sep-96	13-Feb-98	Comprehensive	[X]		X			X	
20	BIT	**Egypt**	13-Nov-96	3-Nov-97	Comprehensive	[X]		X			X	
21	FTA	**Chile**	5-Dec-96	5-Jul-97	Comprehensive	[X]		X			X	
22	BIT	**Thailand**	17-Jan-97	24-Sep-98	Comprehensive	[X]		X			X	
23	BIT	**Croatia**	3-Feb-97	30-Jan-01	Comprehensive	[X]		X			X	
24	BIT	**Lebanon**	11-Apr-97	19-Jun-99	Comprehensive	[X]		X			X	
25	BIT	**Armenia**	8-May-97	29-Mar-99	Comprehensive	[X]		X			X	
26	BIT	**Uruguay**	29-Oct-97	2-Jun-99	Comprehensive	[X]		X			X	
27	BIT	**Costa-Rica**	18-Mar-98	29-Sep-99	Comprehensive	[X]		X			X	

[7] Canada has not ratified the ICSID Convention, making its pre-consents to ICSID arbitration ineffective.

Danish BITs in Force, Through 2002

No	Type	Host	Signed	In Force	Pre-Consent	Designated Arbitral Forum/Fora						
						ICSID	Ad Hoc	UNCITRAL	ICC	SCC	AF	Other
1	BIT	**Indonesia**	30-Jan-68	2-Jul-68	None							
2	BIT	**Romania**	12-Nov-80	9-Apr-81	Partial	X						
3	BIT	**China**	29-Apr-85	29-Apr-85	Partial		X					
4	BIT	**Sri Lanka**	4-Jun-85	4-Jun-85	Comprehensive	X						
5	BIT	**Hungary**	2-May-88	18-Oct-88	Partial	X						
6	BIT	**South Korea**	2-Jun-88	2-Jun-88	Comprehensive	X						
7	BIT	**Turkey**	7-Feb-90	1-Aug-92	Comprehensive	X						
8	BIT	**Poland**	1-May-90	30-Oct-90	Partial	X		X				
9	BIT	**Czech Rep.**	6-Mar-91	19-Sep-92	Comprehensive	X						
10	BIT	**Slovakia**	6-Mar-91	19-Sep-92	Comprehensive	X		X				
11	BIT	**Estonia**	6-Nov-91	24-Feb-93	Comprehensive	X		X				
12	BIT	**Malaysia**	6-Jan-92	18-Sep-92	Comprehensive	X						
13	BIT	**Ghana**	13-Jan-92	6-Jan-95	Comprehensive			X				
14	BIT	**Latvia**	30-Mar-92	18-Nov-94	Comprehensive	X		X				
15	BIT	**Lithuania**	30-Mar-92	8-Jan-93	Comprehensive	X		X				
16	BIT	**Ukraine**	23-Oct-92	29-Apr-94	Comprehensive	X		X				
17	BIT	**Argentina**	6-Nov-92	2-Feb-95	Comprehensive	X		X			X	
18	BIT	**Bulgaria**	14-Apr-93	20-May-95	Partial			X				
19	BIT	**Chile**	28-May-93	3-Nov-95	Comprehensive	X						
20	BIT	**Vietnam**	23-Jul-93	7-Aug-94	Comprehensive	X		X				
21	BIT	**Russia**	4-Nov-93	26-Aug-96	Comprehensive			X		X		
22	BIT	**Romania**	14-Jun-94	24-Aug-95	Comprehensive	X		X				
23	BIT	**Peru**	23-Nov-94	17-Feb-95	Comprehensive	X						
24	BIT	**Venezuela**	28-Nov-94	19-Sep-96	Comprehensive	X		X			X	
25	BIT	**Bolivia**	12-Mar-95	22-Mar-97	Comprehensive	X		X				
26	BIT	**Mongolia**	13-Mar-95	2-Apr-96	Comprehensive	X		X				
27	BIT	**Nicaragua**	13-Mar-95	26-Jan-96	Comprehensive	X						
28	BIT	**Albania**	5-Sep-95	18-Jan-96	Comprehensive	X		X				
29	BIT	**India**	6-Sep-95	28-Aug-96	Comprehensive	X		X			X	
30	BIT	**South Africa**	22-Feb-96	23-Apr-97	Comprehensive	X		X			X	

31	BIT	**Tunisia**[8]	28-Jun-96	11-Apr-97	Comprehensive	X		X				
32	BIT	**Pakistan**	18-Jul-96	25-Sep-96	Comprehensive	X		X				
33	BIT	**Korea-DRP**	10-Sep-96	25-Dec-97	Comprehensive	X		X				
34	BIT	**Zimbabwe**[9]	25-Oct-96	2-Feb-99	Not Avail.							
35	BIT	**Philippines**	25-Sep-97	19-Apr-98	Comprehensive	X		X				
36	BIT	**Laos**	9-Sep-98	9-May-99	Comprehensive	X		X				
37	BIT	**Slovenia**	12-May-99	30-Mar-02	Comprehensive	X		X				
38	BIT	**Egypt**	24-Jun-99	29-Jan-00	Comprehensive	X		X	X			X
39	BIT	**Croatia**	5-Jul-00	12-Jan-02	Comprehensive	X		X	X		X	
40	BIT	**Kuwait**	1-Jun-01	29-Jun-02	Comprehensive	X	X					
41	BIT	**Mozambique**[9]	12-Oct-02	30-Dec-02	Not Avail.							

[8] The Tunisia treaty's pre-consent is arguably ambiguous, and might be interpreted as "promissory." The treaty states that "the investor *shall be entitled to choose* between of the following possibilities for international arbitration," which may be read to mean that "the investor" is not *in the here and now* entitled to so choose.

[9] I was unable to obtain hard copies of the Mozambique and Zimbabwe treaties, despite numerous contacts with Danish officials. In the statistical analysis presented in earlier chapters I have assume that these two treaties contain comprehensive pre-consents to arbitration. My assumption is based on the contemporaneous treaty practice of both Denmark and the two developing countries, whose other BITs uniformly contain comprehensive pre-consents.

Finnish BITs in Force, Through 2002

No.	Type	Host	Signed	In Force	Pre-Consent	Designated Arbitral Forum/Fora						
						ICSID	Ad Hoc	UNCITRAL	ICC	SCC	AF	Other
1	BIT	**Egypt**	5-May-80	1-Feb-82	None							
2	BIT	**Bulgaria**	16-Feb-84	16-Jul-85	None							
3	BIT	**China**	4-Sep-84	26-Jan-86	Partial		X					
4	BIT	**Malaysia**	15-Apr-85	3-Jan-88	Comprehensive	X						
5	BIT	**Sri Lanka**	27-Apr-85	25-Oct-87	Comprehensive	X						
6	BIT	**Hungary**	6-Jun-88	12-May-89	Partial	X						
7	BIT	**Russia**	8-Feb-89	15-Aug-91	Partial		X					
8	BIT	**Poland**	5-Apr-90	29-Mar-91	Partial	X		X				
9	BIT	**Czech Rep.**	6-Nov-90	23-Oct-91	Comprehensive	X		X				
10	BIT	**Slovakia**	6-Nov-90	23-Oct-91	Comprehensive	X		X				
11	BIT	**Estonia**	13-Feb-92	2-Dec-92	Comprehensive	X		X				
12	BIT	**Latvia**	5-Mar-92	7-Dec-92	Comprehensive	X		X				
13	BIT	**Romania**	26-Mar-92	6-Jan-93	Comprehensive	X						
14	BIT	**Ukraine**	5-May-92	30-Jan-94	Comprehensive	X		X				
15	BIT	**Lithuania**	12-Jun-92	8-Jan-93	Comprehensive	X		X				
16	BIT	**Kazakhstan**	29-Sep-92	14-Feb-98	Comprehensive	X		X				
17	BIT	**Uzbekistan**	1-Oct-92	22-Oct-93	Comprehensive	X		X				
18	BIT	**Belarus**	28-Oct-92	11-Dec-94	Comprehensive	X		X				
19	BIT	**Turkey**	13-May-93	12-Apr-95	Comprehensive	X						
20	BIT	**Chile**	27-May-93	1-May-96	Comprehensive	X						
21	BIT	**Vietnam**	13-Sep-93	2-May-96	Comprehensive			X				
22	BIT	**South Korea**	21-Oct-93	11-May-96	Comprehensive	X						
23	BIT	**Argentina**	5-Nov-93	3-May-96	Comprehensive	X		X			X	
24	BIT	**Thailand**[10]	18-Mar-94	18-May-96	None	[X]						
25	BIT	**Peru**	2-May-95	14-Jun-96	Comprehensive	X						

[10] The Thai treaty contains a comprehensive pre-consent to ICSID arbitration, but Thailand has never ratified the ICSID Convention. The BIT is thus properly coded as *not* containing an effective pre-consent.

26	BIT	**Moldova**	25-Aug-95	21-Jun-97	Comprehensive	X		X				
27	BIT	**Kuwait**	10-Mar-96	21-May-97	Comprehensive	X		X				
28	BIT	**UAE**	12-Mar-96	15-May-97	Comprehensive	X		X				
29	BIT	**Indonesia**	13-Mar-96	7-Jun-97	Comprehensive	X						
30	BIT	**Poland**	25-Nov-96	11-Mar-98	Comprehensive	X		X				
31	BIT	**Albania**	24-Jun-97	20-Feb-99	Comprehensive	X		X				
32	BIT	**Lebanon**	25-Aug-97	12-Jan-00	Comprehensive	X		X				
33	BIT	**Oman**	27-Sep-97	20-Feb-99	Comprehensive	X		X				
34	BIT	**Bulgaria**	3-Oct-97	16-Apr-99	Comprehensive	X		X				
35	BIT	**Philippines**	25-Mar-98	16-Apr-99	Comprehensive	X		X				
36	BIT	**Slovenia**	1-Jun-98	3-Jun-00	Comprehensive	X		X				
37	BIT	**South Africa**	14-Sep-98	3-Oct-99	Comprehensive	X		X			X	
38	BIT	**Mexico**	22-Feb-99	30-Aug-00	Comprehensive	[X]		X			X	
39	BIT	**Croatia**	1-Jun-99	1-Nov-02	Comprehensive	X		X				
40	BIT	**Bosnia**	1-Nov-00	8-Dec-01	Comprehensive	X		X				
41	BIT	**Macedonia**	25-Jan-01	22-Mar-02	Comprehensive	X		X			X	
42	BIT	**Ecuador**	18-Apr-01	16-Dec-01	Comprehensive	X		X				
43	BIT	**Tanzania**	19-Jun-01	30-Oct-02	Comprehensive	X		X			X	

French BITs in Force, Through 2002[11]

No.	Type	Host	Signed	In Force	Pre-Consent	Designated Arbitral Fora						
						ICSID	Ad Hoc	UNCITRAL	ICC	SCC	AF	Other
1	BIT	**Tunisia**	9-Aug-63	1-Aug-65	None							
2	BIT	**Zaire**	5-Oct-72	1-Mar-75	None							
3	BIT	**Mauritius**	22-Mar-73	1-Mar-74	None							
4	BIT	**Egypt**	22-Dec-74	1-Oct-75	Comprehensive	X						
5	BIT	**Malaysia**	24-Apr-75	1-Sep-76	None							
5	BIT	**Morocco**	15-Jul-75	13-Dec-76	None							
6	BIT	**Singapore**	8-Sep-75	18-Oct-76	Comprehensive	X						
7	BIT	**Malta**	11-Aug-76	1-Jan-78	None							
8	BIT	**Romania**	16-Dec-76	1-Aug-78	Partial	X						
9	BIT	**Syria**	28-Nov-77	1-Mar-79	Comprehensive	X			X			
10	BIT	**South Korea**	28-Dec-77	1-Mar-79	None							
11	BIT	**Jordan**	23-Feb-78	18-Oct-79	Comprehensive	X						
12	BIT	**Sudan**	31-Jul-78	5-Jul-80	Comprehensive	X						
13	BIT	**El Salvador**	20-Sep-78	12-Dec-92	Comprehensive	X			X			
14	BIT	**Paraguay**[12]	30-Nov-78	11-Dec-80	Comprehensive	[X]						
15	BIT	**Liberia**	23-Mar-79	22-Jan-82	Comprehensive	X						
16	BIT	**Sri Lanka**	10-Apr-80	19-Apr-82	Comprehensive	X						
17	BIT	**Equa. Guinea**	3-Mar-82	23-Sep-83	Comprehensive	X			X			
18	BIT	**Panama**	5-Nov-82	9-Oct-85	Comprehensive			X				
19	BIT	**Nepal**	2-May-83	13-Jun-85	Comprehensive	X						
20	BIT	**Pakistan**	1-Jun-83	14-Dec-84	Comprehensive	X						
21	BIT	**Israel**	9-Jun-83	11-Jan-85	Comprehensive	X						
22	BIT	**Costa Rica**	8-Mar-84	18-Jun-99	Comprehensive	X						

[11] The list of French BITs does not include a number of early "establishment" treaties between France and Franc-zone ex-colonies, nor any of a number of "investment guarantee treaties" (IGT) that primarily concern access to France's investment insurance program. These other types of treaties are certainly investment-related, but are sufficiently distinct in their substantive and procedural content from BITs that they should not be included in the present analysis. The excluded establishment treaties include treaties with the following countries (with years of signature in [brackets]): Central African Republic [1960]; Chad {1960]; Congo [1960]; Gabon [1974]; Senegal [1974]; Madagascar [1965]. The excluded IGT treaties include treaties with Tunisia [1972]; Haiti [1973]; South Korea [1975]; Yugoslavia [1974]; Indonesia [1973]; Philippines [1976].

[12] Paraguay did not ratify the ICSID Convention until 1983, which means that its comprehensive pre-consent should not be recorded as effective until that year.

23	BIT	**Yemen**	27-Apr-84	19-Jul-91	Comprehensive	X		X				
24	BIT	**Haiti**	23-May-84	25-Mar-85	Comprehensive				X			
25	BIT	**China**	30-May-84	19-Mar-85	Partial			X				
26	BIT	**Bangladesh**	10-Sep-85	3-Oct-86	Comprehensive	X						
27	BIT	**Hungary**	6-Nov-86	30-Sep-87	Partial	X		X				
28	BIT	**Poland**	14-Feb-89	10-Feb-90	Partial	X		X				
29	BIT	**Bulgaria**	5-Apr-89	1-May-90	Partial			X				
30	BIT	**Russia**	4-Jul-89	18-Jul-91	Partial			X				
31	BIT	**Kuwait**	27-Sep-89	16-May-91	Comprehensive	X	X					
32	BIT	**Bolivia**	25-Oct-89	12-Oct-96	Comprehensive	X		X				
33	BIT	**Laos**[13]	12-Dec-89	8-Mar-91	[None]	[X]						
34	BIT	**Nigeria**	27-Feb-90	19-Aug-91	Comprehensive	X						
35	BIT	**Czech Rep.**	13-Sep-90	27-Sep-91	Comprehensive	X		X				
36	BIT	**Slovakia**	13-Sep-90	27-Sep-91	Comprehensive	X		X				
37	BIT	**Argentina**	3-Jul-91	3-Mar-93	Comprehensive	X		X			X	
38	BIT	**UAE**	9-Sep-91	10-Jan-95	Comprehensive	X	X					
39	BIT	**Mongolia**	8-Nov-91	22-Dec-93	Comprehensive	X						
40	BIT	**Lithuania**	23-Apr-92	27-Mar-95	Comprehensive	X		X				
41	BIT	**Estonia**	14-May-92	25-Sep-95	Comprehensive	X		X				
42	BIT	**Latvia**	15-May-92	1-Oct-94	Comprehensive	X		X				
43	BIT	**Vietnam**	26-May-92	10-Aug-94	Comprehensive	X		X				
44	BIT	**Chile**	14-Jul-92	13-Jun-94	Comprehensive	X						
45	BIT	**Jamaica**	25-Jan-93	15-Sep-94	Comprehensive	X						
46	BIT	**Algeria**	13-Feb-93	27-Jun-00	Comprehensive	X		X				
47	BIT	**Peru**	6-Oct-93	4-Jul-96	Comprehensive	X						
48	BIT	**Uruguay**	14-Oct-93	4-Jul-97	Comprehensive	X		X				
49	BIT	**Uzbekistan**	27-Oct-93	15-Jun-96	Comprehensive	X						
50	BIT	**Trin.-Tobago**	28-Oct-93	16-May-96	Comprehensive	X		X	X			
51	BIT	**Turkmenistan**	28-Apr-94	2-May-96	Comprehensive	X						
52	BIT	**Ukraine**[14]	3-May-94	26-Jan-96	Comprehensive	[X]						
53	BIT	**Kyrgyzstan**	2-Jun-94	10-Aug-97	[None]	[X]						
54	BIT	**Ecuador**	7-Sep-94	17-Jun-96	Comprehensive	X						

[13] The Laos, Kyrgyzstan, and Moldova BITs contain comprehensive pre-consents to ICSID arbitration, but none of these three countries have ratified the Convention. This renders their pre-consents ineffective, and I have accordingly coded the treaties as not having a pre-consent.

[14] Ukraine did not ratify the ICSID Convention until 2000, which means that its comprehensive pre-consent should not be recorded as effective until that year.

55	BIT	**Philippines**[15]	13-Sep-94	13-Jun-96	Comprehensive	X						
56	BIT	**Oman**	17-Oct-94	4-Jul-96	Comprehensive	X						
57	BIT	**Romania**	21-Mar-95	21-Jun-96	Comprehensive	X						
58	BIT	**Albania**	13-Jun-95	16-Jun-96	Comprehensive	X						
59	BIT	**South Africa**	11-Oct-95	22-Jun-97	Comprehensive	X	X					
60	BIT	**Armenia**	4-Nov-95	21-Jun-97	Comprehensive	X						
61	BIT	**Morocco**	13-Jan-96	30-May-99	Comprehensive	X						
62	BIT	**Croatia**	3-Jun-96	5-Mar-98	Comprehensive	X		X				
63	BIT	**Qatar**	8-Sep-96	27-Jul-00	Comprehensive	X		X				
64	BIT	**Lebanon**	28-Nov-96	29-Oct-99	Comprehensive	X		X				
65	BIT	**Georgia**	3-Feb-97	13-Apr-00	Comprehensive	X						
66	BIT	**Cuba**	25-Apr-97	6-Nov-99	Comprehensive			X				
67	BIT	**India**	2-Sep-97	17-May-00	Comprehensive	X		X				
68	BIT	**Moldova**	8-Sep-97	3-Nov-99	[None]	[X]						
69	BIT	**Tunisia**	20-Oct-97	18-Jan-99	Comprehensive	X						
70	BIT	**Macedonia**	28-Jan-98	31-Mar-00	Comprehensive	X						
71	BIT	**Kazakhstan**	3-Feb-98	21-Aug-00	Comprehensive	X		X				
72	BIT	**Slovenia**	11-Feb-98	5-Aug-00	Comprehensive	X						
73	BIT	**Nicaragua**	13-Feb-98	31-Mar-00	Comprehensive	X						
74	BIT	**Honduras**	27-Apr-98	8-Mar-01	Comprehensive	X		X				
75	BIT	**Guatemala**	27-May-98	28-Oct-01	Comprehensive	X						
76	BIT	**Azerbaijan**	1-Sep-98	24-Aug-00	Comprehensive	X						
77	BIT	**Mexico**	12-Nov-98	12-Oct-00	Comprehensive	X		X	X		X	
78	BIT	**Cambodia**	13-Jul-00	24-Jul-02	Comprehensive	X						

[15] The Philippines' pre-consent is promissory in its official English version, which states that the Contracting Parties "shall assent" to investor-initiated arbitration. But in the equally official French version, the pre-consent is clearly effective immediately: each Contracting Party "*consent*" to investor-initiated arbitration (present tense) I have coded the treaty according to the French version.

German BITs in Force, Through 2002

No.	Type	Host	Signed	In Force	Pre-Consent	Designated Arbitral Fora						
						ICSID	Ad Hoc	UNCITRAL	ICC	SCC	AF	Other
1	BIT	**Pakistan**	25-Nov-59	28-Apr-62	None							
2	FCN	**Dominican Republic**[16]	16-Dec-59	3-Jun-60	None							
3	BIT	**Malaysia**	22-Dec-60	6-Jul-63	None							
4	BIT	**Greece**	27-Mar-61	15-Jul-63	None							
5	BIT	**Togo**	16-May-61	21-Dec-64	None							
6	BIT	**Morocco**	31-Aug-61	21-Jan-68	None							
7	BIT	**Liberia**	12-Dec-61	22-Oct-67	None							
8	BIT	**Thailand**	13-Dec-61	10-Apr-65	None							
9	BIT	**Guinea**	19-Apr-62	13-Mar-65	None							
10	BIT	**Turkey**	20-Jun-62	16-Dec-65	None							
11	BIT	**Cameroon**	29-Jun-62	21-Nov-63	None							
12	BIT	**Madagascar**	21-Sep-62	21-Mar-66	None							
13	BIT	**Sudan**	7-Feb-63	24-Nov-67	None							
14	BIT	**Sri Lanka**	8-Nov-63	7-Dec-66	None							
15	BIT	**Tunisia**	20-Dec-63	6-Feb-66	None							
16	BIT	**Senegal**	24-Jan-64	16-Jan-66	None							
17	BIT	**South Korea**	4-Feb-64	15-Jan-67	None							
18	EOL	**India**[17]	15-Oct-64	15-Oct-64	None							
19	BIT	**Niger**	29-Oct-64	10-Jan-66	None							
20	BIT	**Tanzania**	30-Jan-65	12-Jul-68	None							
21	BIT	**Sierra Leone**	8-Apr-65	10-Dec-66	None							
22	BIT	**Ecuador**	28-Jun-65	30-Nov-66	None							
23	BIT	**Cen'l African Rep.**	23-Aug-65	21-Jan-68	None							
24	BIT	**Congo**	13-Sep-65	14-Oct-67	None							
25	BIT	**Iran**	11-Nov-65	6-Apr-68	None							
26	BIT	**Côte d'Ivoire**	27-Oct-66	10-Jun-68	None							
27	BIT	**Uganda**	29-Nov-66	19-Aug-68	None							

[16] The various sources disagree on whether the Germany-Dominican Republic FCN entered into force in 1959 or 1960. I have been unable to directly confirm the correct date.

[17] The Indian "treaty" is actually an "exchange of letters" rather than an actual treaty.

28	BIT	**Zambia**	10-Dec-66	25-Aug-72	None							
29	BIT	**Chad**	11-Apr-67	23-Nov-68	None							
30	BIT	**Rwanda**	18-May-67	28-Feb-69	None							
31	BIT	**Indonesia**	8-Nov-68	19-Apr-71	None							
32	BIT	**Zaire**	18-Mar-69	22-Jul-71	None							
33	BIT	**Gabon**	16-May-69	29-Mar-71	None							
34	BIT	**Mauritius**	25-May-71	27-Aug-73	None							
35	BIT	**Haiti**	14-Aug-73	1-Dec-75	None							
36	BIT	**Singapore**	3-Oct-73	1-Oct-75	None							
37	BIT	**Yemen**	21-Jun-74	19-Dec-78	None							
38	BIT	**Egypt**	5-Jul-74	22-Jul-78	None							
39	BIT	**Jordan**	15-Jul-74	10-Oct-77	None							
40	BIT	**Malta**	17-Sep-74	14-Dec-75	None							
41	BIT	**Mali**	28-Jun-77	16-May-80	None							
42	BIT	**Syria**	2-Aug-77	20-Apr-80	None							
43	BIT	**Benin**	29-Jun-78	18-Jul-85	None							
44	BIT	**Oman**	25-Jun-79	4-Feb-86	None							
45	BIT	**Romania**	12-Oct-79	1-Oct-81	Partial	1						
46	BIT	**Portugal**	16-Sep-80	23-Apr-82	None							
47	BIT	**Papua New Guinea**	12-Nov-80	3-Nov-83	None							
48	BIT	**Bangladesh**	6-May-81	14-Sep-86	None							
49	BIT	**Somalia**	27-Nov-81	15-Feb-85	None							
50	BIT	**Lesotho**	11-Nov-82	17-Aug-85	None							
51	BIT	**Mauritania**	8-Dec-82	26-Apr-86	None							
52	BIT	**China**	7-Oct-83	18-Mar-85	Partial		1					
53	BIT	**Panama**	2-Nov-83	10-Mar-89	Comprehensive			1				
54	BIT	**Burundi**	10-Sep-84	9-Dec-87	None							
55	BIT	**Dominica**	1-Oct-84	11-May-86	None							
56	BIT	**Saint Lucia**[18]	16-Mar-85	22-Jul-87	[Comprehensive]	[1]						
57	BIT	**Saint Vincent-Gren.**	25-Mar-86	8-Jan-89	None							
58	BIT	**Bulgaria**	12-Apr-86	10-Mar-88	Partial			1				
59	BIT	**Hungary**	30-Apr-86	7-Nov-87	Partial	1	1					
60	BIT	**Nepal**	20-Oct-86	7-Jul-88	Comprehensive	1						

[18] Saint Lucia has never ratified the ICSID Convention, making its comprehensive pre-consent ineffective.

61	BIT	**Bolivia**	23-Mar-87	9-Nov-90	Comprehensive	1	1					
62	BIT	**Uruguay**	4-May-87	29-Jun-90	Comprehensive	1	1					
63	BIT	**Russia**	13-Jun-89	5-Aug-91	Partial		1					
64	BIT	**Yugoslavia**	10-Jul-89	26-Oct-90	[Comprehensive]	[1]						
65	BIT	**Poland**	10-Nov-89	24-Feb-91	Partial		1					
66	BIT	**Guyana**	6-Dec-89	8-Mar-94	Comprehensive	1						
67	BIT	**Cape Verde**	18-Jan-90	15-Dec-93	Comprehensive	1	1					
68	BIT	**Swaziland**	5-Apr-90	7-Aug-95	Comprehensive	1						
69	BIT	**Czech Republic**	2-Oct-90	2-Aug-92	Comprehensive		1					
70	BIT	**Slovakia**	2-Oct-90	2-Aug-92	Comprehensive		1					
71	BIT	**Argentina**	9-Apr-91	8-Nov-93	Comprehensive	1	1					
72	BIT	**Mongolia**	26-Jun-91	23-Jun-96	Comprehensive	1	1					
73	BIT	**Chile**	21-Oct-91	18-Jul-99	Comprehensive	1						
74	BIT	**Albania**	31-Oct-91	18-Aug-95	Comprehensive	1	1					
75	BIT	**Serbia**[19]	1-Jan-92	1-Jan-92	[Comprehensive]	[1]						
76	BIT	**Lithuania**	28-Feb-92	27-Jun-97	Comprehensive	1	1					
77	BIT	**Kazakhstan**[20]	22-Sep-92	10-May-95	[Comprehensive]	[1]						
78	BIT	**Jamaica**	24-Sep-92	29-May-96	Comprehensive	1						
79	BIT	**Estonia**	12-Nov-92	12-Jan-97	Comprehensive	1	1					
80	BIT	**Ukraine**	15-Feb-93	29-Jun-96	Comprehensive	1	1					
81	BIT	**Belarus**	2-Apr-93	23-Sep-96	Comprehensive	1						
82	BIT	**Vietnam**	3-Apr-93	19-Sep-98	Comprehensive	1	1					
83	BIT	**Latvia**	20-Apr-93	9-Jun-96	Comprehensive	1	1					
84	BIT	**Uzbekistan**	28-Apr-93	23-May-98	Comprehensive	1	1					
85	BIT	**Georgia**	25-Jun-93	27-Sep-98	Comprehensive	1	1					
86	BIT	**Paraguay**	11-Aug-93	3-Jul-98	Comprehensive	1						
87	BIT	**Slovenia**	28-Oct-93	18-Jul-98	Comprehensive	1						
88	BIT	**Namibia**[21]	21-Jan-94	21-Dec-97	[Comprehensive]	[1]						
89	BIT	**Kuwait**	30-Mar-94	15-Nov-97	Comprehensive	1	1					
90	BIT	**Costa Rica**	13-Sep-94	24-Mar-98	Comprehensive	1						
91	BIT	**Barbados**	2-Dec-94	11-May-02	Comprehensive	1	1					

[19] Serbia has not ratified the ICSID Convention, making its 1989 pre-consent in the Yugoslavia BIT ineffective as to Serbia.
[20] Kazakhstan did not ratify the ICSID Convention until 2000, makings its pre-consent ineffective until that year.
[21] Namibia has not ratified the ICSID Convention, makings its pre-consent ineffective across the period of the present study.

92	BIT	**Peru**	30-Jan-95	1-May-97	Comprehensive	1		1				
93	BIT	**Ghana**	24-Feb-95	23-Nov-98	Comprehensive	1	1	1				
94	BIT	**Honduras**	21-Mar-95	27-May-98	Comprehensive	1						
95	BIT	**India**	10-Jul-95	13-Jul-98	Comprehensive	1		1				
96	BIT	**South Africa**	11-Sep-95	10-Apr-98	Comprehensive	1					1	
97	BIT	**Zimbabwe**	29-Sep-95	14-Apr-00	Comprehensive	1						
98	BIT	**Armenia**	21-Dec-95	23-Jun-97	Comprehensive	1						
99	BIT	**Azerbaijan**	22-Dec-95	29-Jul-98	Comprehensive	1	1					
100	BIT	**Algeria**	11-Mar-96	30-May-02	Comprehensive	1						
101	BIT	**Ecuador**	21-Mar-96	12-Feb-99	Comprehensive	1						
102	BIT	**Cuba**	30-Apr-96	22-Nov-98	Comprehensive	1	1					
103	BIT	**Kenya**	3-May-96	7-Dec-00	Comprehensive	1						
104	BIT	**Nicaragua**	6-May-96	19-Jan-01	Comprehensive	1						
105	BIT	**Venezuela**	14-May-96	16-Oct-98	Comprehensive	1		1			1	
106	BIT	**Qatar**	14-Jun-96	19-Jan-99	Comprehensive	1		1				
107	BIT	**Romania**	25-Jun-96	12-Dec-98	Comprehensive	1						
108	BIT	**Laos**	9-Aug-96	24-Mar-99	Comprehensive	1	1					
109	BIT	**Macedonia**	10-Sep-96	17-Sep-00	Comprehensive	1						
110	BIT	**Saudi Arabia**	29-Oct-96	9-Jan-99	Comprehensive	1						
111	BIT	**Lebanon**	18-Mar-97	25-Mar-99	Comprehensive	1		1			1	
112	BIT	**Croatia**[22]	21-Mar-97	28-Sep-00	Comprehensive	1						
113	BIT	**Philippines**	18-Apr-97	1-Feb-00	Comprehensive	1						
114	BIT	**UAE**	21-Jun-97	2-Jul-99	Comprehensive	1						
115	BIT	**Kyrgyzstan**[23]	28-Aug-97	6-Sep-98	[Comprehensive]							
116	BIT	**Turkmenistan**	28-Aug-97	19-Feb-01	Comprehensive	1						
117	BIT	**El Salvador**	11-Dec-97	15-Apr-01	Comprehensive	1						
118	BIT	**Mexico**	25-Aug-98	23-Feb-01	Comprehensive	1	1		1		1	
119	BIT	**Gabon**	15-Sep-98	23-Feb-01	Comprehensive	1						
120	BIT	**Antigua-Barbuda**	5-Nov-98	28-Feb-01	Comprehensive	1	1					
121	BIT	**Cambodia**	15-Feb-99	14-Apr-02	Comprehensive	1	1					

[22] The 1997 Croatian BIT does not indicate that Croatia considered itself bound by the 1989 Yugoslavia BIT. I have assumed here that it was not. In any event Bosnia did not ratify the ICSID Convention until 1997, meaning that the 1989 pre-consent would have been ineffective.

[23] I was unable to obtain a copy of the text of the Kyrgyzstan BIT. In the statistical analyses in previous chapters I assumed that the treaty contained an effective pre-consent, in line with contemporaneous Germany and Kyrgyzstan BIT practice.

Italian BITs in Force, Through 2002

No.	Type	Host	Signed	In Force	Pre-Consent	Designated Arbitral Fora						
						ICSID	Ad Hoc	UNCITRAL	ICC	SCC	AF	Other
1	BIT	**Guinea**	20-Feb-64	20-Feb-64	None							
2	BIT	**Malta**	28-Jul-67	15-Oct-73	None							
3	BIT	**Chad**	11-Jun-69	11-Jun-69	Comprehensive	X						
4	BIT	**Romania**	14-Jan-77	6-Mar-79	Partial	X						
5	BIT	**China**	28-Jan-85	28-Aug-87	Partial		X					
6	BIT	**Tunisia**	17-Oct-85	24-Jun-89	Comprehensive	X	X					
7	BIT	**Hungary**	17-Feb-87	23-Feb-90	Partial	X		X				
8	BIT	**Sri Lanka**[24]	25-Mar-87	20-Mar-90	Partial	X	X					
9	BIT	**Kuwait**	17-Dec-87	21-May-90	Comprehensive	X		X			X	
10	BIT	**Malaysia**	4-Jan-88	25-Oct-90	Comprehensive	X						
11	BIT	**Philippines**	17-Jun-88	4-Nov-93	Comprehensive	X						
12	BIT	**Bulgaria**	5-Dec-88	27-Dec-90	Partial			X				
13	BIT	**South Korea**	10-Jan-89	26-Jun-92	Comprehensive	X						
14	BIT	**Egypt**	2-Mar-89	1-May-94	Comprehensive	X		X				
15	BIT	**Poland**	10-May-89	10-Jan-93	Partial	X		X				
16	BIT	**Russia**	30-Nov-89	8-Jul-91	Partial			X				
17	BIT	**Uruguay**	21-Feb-90	2-Mar-98	Comprehensive	X	X					
18	BIT	**Bangladesh**	20-Mar-90	20-Sep-94	Partial	X		X				
19	BIT	**Bolivia**	30-Apr-90	22-Feb-92	Comprehensive	X		X				
20	BIT	**Vietnam**	18-May-90	6-May-94	Comprehensive	[X]		X				
21	BIT	**Argentina**	22-May-90	14-Oct-93	Comprehensive	X		X			X	
22	BIT	**Morocco**	18-Jul-90	7-Apr-00	Comprehensive	X						
23	BIT	**Romania**	6-Dec-90	14-Mar-95	Comprehensive	X		X				
24	BIT	**Indonesia**	25-Apr-91	25-Jun-95	Comprehensive	X		X				
25	BIT	**Algeria**	18-May-91	26-Nov-93	Comprehensive	X	X					
26	BIT	**Albania**	12-Sep-91	29-Jan-96	Comprehensive	X		X			X	
27	BIT	**Mongolia**	15-Jan-93	1-Sep-95	Comprehensive	X		X				

[24] The Sri Lanka treaty's pre-consent is ambiguous as to whether the investor or the Contracting Party gets to choose the dispute settlement forum.

28	BIT	**Chile**	8-Mar-93	8-Feb-95	Comprehensive	X		X				
29	BIT	**Cuba**	7-May-93	23-Aug-95	Comprehensive		X					
30	BIT	**Oman**	23-Jun-93	23-Jan-97	Comprehensive			X				
31	BIT	**Jamaica**	29-Sep-93	9-Nov-95	Promissory	X		X				
32	BIT	**Peru**	5-May-94	18-Oct-95	Comprehensive	X		X				
33	BIT	**Kazakhstan**	22-Sep-94	12-Jul-96	Comprehensive	X		X				
34	BIT	**Lithuania**	1-Dec-94	15-Apr-97	Comprehensive	X		X				
35	BIT	**Ethiopia**	23-Dec-94	8-May-97	Comprehensive	X		X				
36	BIT	**UAE**	22-Jan-95	29-Apr-97	Comprehensive	X		X				
37	BIT	**Ukraine**	2-May-95	12-Sep-97	Comprehensive	X		X				
38	BIT	**Belarus**	25-Jul-95	12-Aug-97	Comprehensive	X		X				
39	BIT	**Barbados**[25]	25-Oct-95	21-Jul-97	Partial	X						
40	BIT	**India**	23-Nov-95	26-Mar-98	Comprehensive	X		X			X	
41	BIT	**Czech Rep.**	22-Jan-96	1-Nov-97	Comprehensive	X		X				
42	BIT	**Russia**	9-Apr-96	7-Jul-97	Comprehensive			X				
43	BIT	**Jordan**	21-Jul-96	17-Jan-01	Comprehensive	X						
44	BIT	**Saudi Arabia**	10-Sep-96	22-May-98	Comprehensive	X						
45	BIT	**Kenya**	16-Sep-96	4-Aug-99	Comprehensive	X		X				
46	BIT	**Croatia**	5-Nov-96	12-Jun-98	Comprehensive	X		X				
47	BIT	**Macedonia**	26-Feb-97	28-May-99	Comprehensive	X		X				
48	BIT	**Estonia**	20-Mar-97	9-May-00	Comprehensive	X		X				
49	BIT	**Georgia**	15-May-97	26-Jul-99	Comprehensive	X		X				
50	BIT	**Latvia**	21-May-97	2-Mar-99	Comprehensive	X		X				
51	BIT	**South Africa**	9-Jun-97	16-Mar-99	Comprehensive	X		X			X	
52	BIT	**Pakistan**	19-Jul-97	22-Jun-01	Comprehensive	X		X				
53	BIT	**Uzbekistan**	17-Sep-97	14-Oct-99	Comprehensive	X		X				
54	BIT	**Azerbaijan**	25-Sep-97	4-Feb-00	Comprehensive	X		X				
55	BIT	**Lebanon**	7-Nov-97	9-Feb-00	Comprehensive	X		X				
56	BIT	**Uganda**	12-Dec-97	24-Sep-99	Comprehensive	X		X				
57	BIT	**Slovakia**	30-Jul-98	22-Nov-00	Comprehensive	X		X				

[25] Barbados' consent is very ambiguous, and a tribunal might view it as promissory.

58	BIT	**Mexico**	24-Nov-99	5-Dec-02	Comprehensive	[X]		X			X	

Japanese BITs in Force, Through 2002

No.	Type	Host	Signed	In Force	Pre-Consent	Designated Arbitral Fora						
						ICSID	Ad Hoc	UNCITRAL	ICC	SCC	AF	Other
1	FCN	**India**[26]	4-Feb-58	8-Apr-58	None							
2	FCN	**Cuba**	22-Apr-60	20-Jul-60	None							
3	FCN	**Malaysia**	10-May-60	16-Aug-60	None							
4	FCN	**Singapore**	10-May-60	16-Aug-60	None							
5	FCN	**Peru**	15-May-61	18-Dec-61	None							
6	FCN	**Indonesia**	1-Jul-61	8-Mar-63	None							
7	FCN	**Argentina**	20-Dec-61	25-Sep-67	None							
8	FCN	**El Salvador**	19-Jul-63	1-Jul-64	None							
9	FCN	**Pakistan**	8-Dec-69	20-Aug-61	None							
10	BIT	**Egypt**[27]	28-Jan-77	14-Jan-78	Promissory	X						
11	BIT	**Philippines**	10-May-79	20-Jul-80	None							
12	BIT	**Sri Lanka**	1-Mar-82	7-Aug-82	Promissory	X						
13	BIT	**China**	27-Aug-88	14-May-89	Partial		X					
14	BIT	**Turkey**	12-Feb-92	12-Mar-93	Promissory	X						
15	BIT	**Pakistan**	10-Mar-98	29-May-02	Promissory	X						
16	BIT	**Bangladesh**	10-Nov-98	25-Aug-99	Promissory	X						
17	BIT	**Russia**	13-Nov-98	27-May-00	Comprehensive			X			X	
18	BIT	**Mongolia**	15-Feb-01	24-Mar-02	Promissory	X		X			X	
19	FCN	**Singapore**	13-Jan-02	1-Nov-02	Comprehensive	X	X	X			X	

[26] The Japan-India FCN contains substantive provisions dealing with MFN and national treatment for protection of property and business interests, but does not explicitly address issues of expropriation. It is at least debatable whether the treaty should be considered a rough BIT equivalent.

[27] The Japan-Egypt BIT, like Japan's other "promissory" BITs, provides that the Contracting Parties "shall consent" to the investor's request for arbitration. It is possible that the implicit futurity of the consent, as indicated by "shall", is an artifact of the English translations of the treaties. I have not been able to obtain the original Japanese texts to verify whether they also indicate promissory rather than actual consent.

Netherlands BITs in Force, Through 2002

No.	Type	Host	Signed	In Force	Pre-Consent							
						ICSID	Ad Hoc	UNCITRAL	ICC	SCC	AF	Other
1	BIT	**Tunisia**[28]	23-May-63	19-Dec-64	None							
2	BIT	**Côte d'Ivoire**	26-Apr-65	8-Sep-66	None							
3	BIT	**Senegal**	12-Jun-65	23-May-67	None							
4	BIT	**Cameroon**	6-Jul-65	7-May-66	None							
5	FCN	**Indonesia**	7-Jul-68	17-Jul-71	Promissory	X						
6	BIT	**Tanzania**	14-Apr-70	28-Jul-72	None							
7	BIT	**Sudan**	22-Aug-70	27-Mar-72	None							
8	BIT	**Kenya**	11-Sep-70	11-Jun-79	Promissory	X						
9	BIT	**Malaysia**	15-Jun-71	13-Sep-72	Promissory	X						
10	BIT	**Morocco**	23-Dec-71	27-Jul-78	Promissory	X						
11	BIT	**Singapore**	16-May-72	7-Sep-73	Promissory	X						
12	BIT	**Thailand**	6-Jun-72	3-Mar-73	None							
13	BIT	**South Korea**	16-Oct-74	1-Jun-75	Promissory	X						
14	BIT	**Yugoslavia**	16-Feb-76	1-Apr-77	None							
15	BIT	**Egypt**	30-Oct-76	1-Jan-78	Promissory	X						
16	BIT	**Senegal**	3-Aug-79	5-May-81	Promissory	X						
17	BIT	**Romania**	27-Oct-83	1-Oct-84	Partial	X						
18	BIT	**Sri-Lanka**	26-Apr-84	1-May-85	Comprehensive	X						
19	BIT	**Malta**	10-Sep-84	1-Jul-85	None							
20	BIT	**Philippines**	27-Feb-85	1-Oct-87	Promissory	X						
21	BIT	**Yemen**[29]	18-Mar-85	1-Sep-86	[Comprehensive]	[X]						
22	BIT	**China**	17-Jun-85	1-Feb-87	Partial		X					
23	BIT	**Turkey**[30]	27-Mar-86	1-Nov-86	[Comprehensive]	[X]						
24	BIT	**Hungary**	2-Sep-87	1-Jun-88	Partial	X	X					

[28] The Tunisian BIT, like many other early Dutch BIT-like treaties, is actually titled an "economic and technical cooperation agreement". However, its scope of content is much more limited than a typical United States, Japanese, or German FCN treaty. For that reason it is not unduly misleading to call these treaties "BITs."

[29] Yemen did not ratify the ICSID Convention until 2004, making its pre-consent ineffective across the period of this study.

[30] Turkey did not ratify the ICSID Convention until 1989, making its pre-consent ineffective until that date.

25	BIT	**Oman**	19-Sep-87	1-Feb-89	Comprehensive		X					
26	BIT	**Bulgaria**	8-Mar-88	24-May-90	Partial			X				
27	BIT	**Uruguay**	22-Sep-88	1-Aug-91	Comprehensive	[X]	X					
28	BIT	**Pakistan**	4-Oct-88	1-Oct-89	Promissory	X						
29	BIT	**Ghana**	31-Mar-89	1-Jul-91	Comprehensive	X		X				
30	BIT	**Russia**	5-Oct-89	20-Jul-91	Partial		X					
31	BIT	**Jamaica**	18-Apr-91	1-Aug-92	Comprehensive	X						
32	BIT	**Czech Rep.**	29-Apr-91	1-Oct-92	Comprehensive			X				
33	BIT	**Slovakia**	29-Apr-91	1-Oct-92	Comprehensive			X				
34	BIT	**Venezuela**	22-Oct-91	1-Nov-93	Comprehensive	X					X	
35	BIT	**Cape Verde**	11-Nov-91	25-Nov-92	Comprehensive	X	X					
36	BIT	**Bolivia**	10-Mar-92	1-Nov-94	Comprehensive	X	X					
37	BIT	**Poland**[31]	7-Sep-92	1-Feb-94	Partial	[X]	X					
38	BIT	**Argentina**	20-Oct-92	1-Oct-94	Comprehensive	X		X			X	
39	BIT	**Estonia**	27-Oct-92	1-Sep-93	Comprehensive	X		X				
40	BIT	**Paraguay**[32]	29-Oct-92	1-Aug-94	Comprehensive	X						
41	BIT	**Nigeria**	2-Nov-92	1-Feb-94	Comprehensive	X						
42	BIT	**Lithuania**	26-Jan-94	1-Apr-95	Comprehensive	X						
43	BIT	**Vietnam**	10-Mar-94	1-Feb-95	Comprehensive	X		X				
44	BIT	**Latvia**[33]	14-Mar-94	1-Apr-95	[Comprehensive]	[X]						
45	BIT	**Indonesia**	6-Apr-94	1-Jul-95	Comprehensive	X						
46	BIT	**Albania**	15-Apr-94	1-Sep-95	Comprehensive	X		X				
47	BIT	**Romania**	19-Apr-94	1-Feb-95	Comprehensive	X		X				
48	BIT	**Ukraine**	14-Jul-94	1-Jun-97	Comprehensive	X					X	
49	BIT	**Bangladesh**	1-Nov-94	1-Jun-96	Comprehensive	X						
50	BIT	**Peru**	27-Dec-94	1-Feb-96	Comprehensive	X						
51	BIT	**Mongolia**	9-Mar-95	1-Jun-96	Comprehensive	X						

[31] The Polish BIT limits its pre-consent to disputes involving "the essential aspects pertaining to the conduct of business". It is quite unclear how broadly (or how narrowly) a tribunal would be likely to interpret this limitation. I have assumed that the pre-consent is approximately as narrow as those which explicitly limit themselves to expropriation-type disputes.

[32] Paraguay limits its pre-consent to arbitral review of domestic court judgments for violations of "international law" or for "obvious unfairness". It is not clear how limiting this restriction is in practice.

[33] Latvia did not ratify the ICSID Convention until 1997, which means that its pre-consent was ineffective until that date.

52	BIT	**Belarus**	11-Apr-95	1-Aug-96	Comprehensive	X						
53	BIT	**South Africa**	9-May-95	1-May-99	Comprehensive	X		X	X		X	
54	BIT	**Moldova**[34]	26-Sep-95	1-May-97	[Comprehensive]	[X]						
55	BIT	**India**	6-Nov-95	1-Dec-96	Comprehensive			X				
56	BIT	**Egypt**	17-Jan-96	1-Mar-98	Comprehensive	X		X	X			X
57	BIT	**Uzbekistan**	14-Mar-96	1-Jul-97	Comprehensive	X						
58	BIT	**Slovenia**	24-Sep-96	1-Aug-98	Comprehensive	X						
59	BIT	**Zimbabwe**	11-Dec-96	1-May-98	Comprehensive	X						
60	BIT	**Jordan**	17-Nov-97	1-Aug-98	Comprehensive	X						
61	BIT	**Georgia**	3-Feb-98	1-Mar-99	Comprehensive	X						
62	BIT	**Croatia**	28-Apr-98	1-Jun-99	Comprehensive	X					X	
63	BIT	**Tunisia**	11-May-98	1-Aug-99	Comprehensive	X						
64	BIT	**Mexico**	13-May-98	1-Oct-99	Comprehensive	X		X			X	
65	BIT	**Bosnia**	13-May-98	1-Jan-02	Comprehensive	X						
66	BIT	**Macedonia**	7-Jul-98	1-Jun-99	Comprehensive	X						
67	BIT	**Costa Rica**	21-May-99	1-Jul-01	Comprehensive	X		X			X	
68	BIT	**Ecuador**	27-Jun-99	1-Jul-01	Comprehensive	X		X				
69	BIT	**Bulgaria**	6-Oct-99	1-Mar-01	Comprehensive	X		X			X	
70	BIT	**El Salvador**	12-Oct-99	1-Mar-01	Comprehensive	X		X				
71	BIT	**Cuba**	2-Nov-99	1-Nov-01	Comprehensive	X		X	X			
72	BIT	**Panama**	28-Aug-00	1-Sep-01	Comprehensive	X						
73	BIT	**Nicaragua**	28-Aug-00	11-Oct-02	Comprehensive	X						
74	BIT	**Honduras**	15-Jan-01	1-Sep-02	Comprehensive	X		X				
75	BIT	**Guatemala**	18-May-01	1-Sep-02	Comprehensive	X		X			X	
76	BIT	**Kuwait**	29-May-01	31-May-02	Comprehensive	X						
77	BIT	**Mozambique**	18-Dec-01	26-Feb-02	Comprehensive	X						

[34] Moldova has not ratified the ICSID Convention, meaning that its pre-consent is not effective.

Norwegian BITs in Force, Through 2002

No.	Type	Host	Signed	In Force	Pre-Consent	Designated Arbitral Fora						
						ICSID	Ad Hoc	UNCITRAL	ICC	SCC	AF	Other
1	FCN	**Madagascar**	13-May-66	28-Sep-67	None							
2	BIT	**Indonesia**	24-Nov-69	25-Aug-70	None							
3	BIT	**Malaysia**	6-Nov-84	7-Jan-86	Comprehensive	X						
4	BIT	**China**[35]	21-Nov-84	10-Jul-85	None							
5	BIT	**Sri Lanka**	13-Jun-85	13-Jun-85	Comprehensive	X						
6	BIT	**Poland**	5-Jun-90	24-Oct-90	Partial		X					
7	BIT	**Hungary**	8-Apr-91	4-Dec-92	Partial	X						
8	BIT	**Czech Rep.**	21-May-91	6-Aug-92	Comprehensive	X		X				
9	BIT	**Slovakia**	21-May-91	6-Aug-92	Comprehensive	X		X				
10	BIT	**Romania**	11-Jun-91	23-Mar-92	Comprehensive	X						
11	BIT	**Indonesia**	26-Nov-91	1-Oct-94	Comprehensive	X						
12	BIT	**Estonia**	15-Jun-92	15-Jun-92	Comprehensive	X		X				
13	BIT	**Latvia**	16-Jun-92	1-Dec-92	Comprehensive	X		X				
14	BIT	**Lithuania**	16-Jun-92	20-Dec-92	Comprehensive	X		X				
15	BIT	**Chile**	1-Jun-93	7-Sep-94	Comprehensive	X						
16	BIT	**Peru**	10-Mar-95	9-May-95	Comprehensive	X		X				
17	BIT	**Russia**	4-Oct-95	21-May-98	Comprehensive			X		X		

[35] China's BIT with Norway contains ostensible investor-state dispute settlement provisions for expropriation-compensation disputes, but requires the Contracting Parties, not the investor, to appoint the arbitrators, bear the costs of the arbitration, and so on. I view these provisions as more akin to a state-state dispute settlement mechanism, and accordingly code the treaty as *not* incorporating a meaningfully, partial pre-consent to *investor*-initiated and *investor*-controlled arbitration.

Singapore BITs in Force, Through 2002[36]

No.	Type	Host	Signed	In Force	Pre-Consent	Designated Arbitral Fora						
						ICSID	Ad Hoc	UNCITRAL	ICC	SCC	AF	Other
1	BIT	**Sri Lanka**	9-May-80	30-Sep-80	Comprehensive	X						
2	BIT	**China**	21-Nov-85	7-Feb-86	Partial		X					
3	FTA	**Brunei**	15-Dec-87	2-Aug-88	Comprehensive		X					
4	FTA	**Indonesia**	15-Dec-87	2-Aug-88	Comprehensive		X					
5	FTA	**Malaysia**	15-Dec-87	2-Aug-88	Comprehensive		X					
6	FTA	**Philippines**	15-Dec-87	2-Aug-88	Comprehensive		X					
7	FTA	**Thailand**	15-Dec-87	2-Aug-88	Comprehensive		X					
8	BIT	**Vietnam**	29-Oct-92	25-Dec-92	Promissory			X				
9	BIT	**Poland**	3-Jun-93	29-Dec-93	Promissory			X				
10	BIT	**Pakistan**	8-Mar-95	4-May-95	Comprehensive	X		X				
11	BIT	**Czech Rep.**	8-Apr-95	8-Oct-95	Comprehensive	X		X				
12	BIT	**Mongolia**	24-Jul-95	14-Jan-96	Comprehensive	X						
13	FTA	**Vietnam**	16-Aug-96	16-Aug-96	Comprehensive		X					
14	BIT	**Laos**[37]	24-Mar-97	26-Mar-98	[Comprehensive]	[X]						
15	BIT	**Egypt**	15-Apr-97	1-Mar-98	Comprehensive	X						
16	BIT	**Hungary**	17-Apr-97	1-Jan-99	Comprehensive	X						
17	FTA	**Laos**	23-Jul-97	23-Jul-97	Comprehensive		X					
18	BIT	**Latvia**	7-Jul-98	18-Mar-99	Comprehensive	X						
19	FTA	**Cambodia**	30-Apr-99	30-Apr-99	Comprehensive		X					
20	BIT	**Mauritius**	4-Mar-00	20-Mar-00	Comprehensive	X						
21	BIT	**Belarus**	13-May-00	13-Jan-00	Comprehensive	X						

[36] I have not listed BITjfs between Singapore and the "capital-exporting countries" as defined in previous chapters. Those BITs include treaties with the following countries (with year of signing in [brackets]): the Netherlands [1972]; Germany [1973]; the UK [1975]; France [1975]; Switzerland [1978]; Belgium [1978]. The various BIT-like FTA agreements listed in the table refer to ASEAN's Investment Protocol.

[37] Laos has never ratified the ICSID Convention, which makes its pre-consent in this BIT ineffective across the period of study. However, Laos has an effective pre-consent through an FTA with Singapore, as indicated in the table.

Spanish BITs in Force, Through 2002

No.	Type	Host	Signed	In Force	Pre-Consent	Designated Arbitral Fora						
						ICSID	Ad Hoc	UNCITRAL	ICC	SCC	AF	Other
1	BIT	**Morocco**	27-Sep-89	15-Jan-92	None							
2	BIT	**Hungary**	9-Nov-89	1-Aug-92	Partial				X	X		
3	BIT	**Bolivia**	24-Apr-90	12-May-92	None							
4	BIT	**Russia**	26-Oct-90	28-Nov-91	Partial			X		X		
5	BIT	**Czech Rep.**	12-Dec-90	28-Nov-91	Comprehensive	X		X	X	X		
6	BIT	**Slovakia**	12-Dec-90	28-Nov-91	Comprehensive	X		X	X	X		
7	BIT	**Tunisia**	28-May-91	20-Jun-94	Comprehensive	X		X				
8	BIT	**Chile**	2-Oct-91	28-Mar-94	Comprehensive	X		X			X	
9	BIT	**Argentina**	3-Oct-91	28-Sep-92	Comprehensive	[X]		X				
10	BIT	**China**	6-Feb-92	1-May-93	Partial			X				
11	BIT	**Uruguay**	7-Apr-92	6-May-94	Comprehensive	[X]		X				
12	BIT	**Poland**	30-Jul-92	1-May-93	Comprehensive	X		X	X	X		
13	BIT	**Egypt**	3-Nov-92	26-Apr-94	Comprehensive	X		X	X	X		X
14	BIT	**Paraguay**	11-Oct-93	22-Nov-96	Comprehensive	X		X	X			
15	BIT	**Philippines**	19-Oct-93	21-Sep-94	Comprehensive	X						
16	BIT	**South Korea**	17-Jan-94	19-Jul-94	Comprehensive	X		X				
17	BIT	**Nicaragua**	16-Mar-94	28-Mar-95	Comprehensive	X		X	X			
18	BIT	**Honduras**	18-Mar-94	23-May-96	Comprehensive	X		X	X			
19	BIT	**Kazakhstan**	23-Mar-94	22-Jun-95	Comprehensive	X		X	X			
20	BIT	**Cuba**	27-May-94	9-Jun-95	Comprehensive			X	X			
21	BIT	**Lithuania**	6-Jul-94	22-Dec-95	Comprehensive	X		X	X			
22	BIT	**Pakistan**	15-Sep-94	26-Apr-96	Comprehensive	X		X	X			
23	BIT	**Peru**	17-Nov-94	17-Feb-96	Comprehensive	X		X				
24	BIT	**Algeria**	23-Dec-94	17-Jan-96	Comprehensive	X		X	X	X		
25	BIT	**Romania**	25-Jan-95	7-Dec-95	Comprehensive	X		X				
26	BIT	**El Salvador**	14-Feb-95	20-Feb-96	Comprehensive	X		X				
27	BIT	**Turkey**	15-Feb-95	3-Mar-98	Comprehensive	X		X	X			
28	BIT	**Gabon**	2-Mar-95	12-Dec-01	Comprehensive	X		X				

29	BIT	**Dominican Rep.**	16-Mar-95	7-Oct-96	Comprehensive			X				
30	BIT	**Malaysia**	4-Apr-95	16-Feb-96	Comprehensive	X		X				
31	BIT	**Indonesia**[38]	30-May-95	12-Feb-97	Comprehensive	X		X				
32	BIT	**Mexico**	23-Jun-95	18-Dec-96	Comprehensive	X	X	X			X	
33	BIT	**Bulgaria**	5-Sep-95	22-Apr-98	Partial	[X]		X				
34	BIT	**Latvia**	26-Oct-95	14-Mar-97	Comprehensive	X		X	X			
35	BIT	**Venezuela**	2-Nov-95	10-Sep-97	Comprehensive	X		X			X	
36	BIT	**Lebanon**	22-Feb-96	29-Apr-97	Comprehensive	X		X			X	
37	BIT	**Ecuador**	26-Jun-96	18-Jun-97	Comprehensive	X		X				
38	BIT	**Costa Rica**	8-Jul-97	17-Jul-99	Comprehensive	X		X			X	
39	BIT	**Croatia**	21-Jul-97	17-Sep-98	Comprehensive	X		X			X	
40	BIT	**India**	30-Sep-97	15-Dec-98	Comprehensive	X		X			X	
41	BIT	**Panama**	10-Nov-97	31-Jul-98	Comprehensive	X		X				
42	BIT	**Estonia**	11-Nov-97	1-Jul-98	Comprehensive	X		X	X			
43	BIT	**Ukraine**	26-Feb-98	13-Mar-00	Comprehensive	X		X			X	
44	BIT	**Slovenia**	15-Jul-98	3-Apr-00	Comprehensive	X		X				
45	BIT	**South Africa**	30-Sep-98	23-Dec-99	Comprehensive	X		X			X	
46	BIT	**Jordan**	20-Oct-99	13-Dec-00	Comprehensive	X		X				
47	BIT	**Bolivia**	24-Oct-01	9-Jul-02	Comprehensive	X		X			X	
48	BIT	**Jamaica**	13-Mar-02	25-Nov-02	Comprehensive	X		X				X

[38] Indonesia's pre-consent contains important ambiguities.

Swedish BITs in Force, Through 2002

No.	Type	Host	Signed	In Force	Pre-Consent	Designated Arbitral Fora						
						ICSID	Ad Hoc	UNCITRAL	ICC	SCC	AF	Other
1	FCN	**Côte d'Ivoire**	27-Aug-65	3-Nov-66	None							
2	FCN	**Madagascar**	2-Apr-66	23-Jun-67	None							
3	FCN	**Senegal**	24-Feb-67	23-Feb-68	None							
4	BIT	**Egypt**	15-Jul-78	29-Jan-79	None							
5	BIT	**Yugoslavia**[39]	10-Nov-78	21-Nov-79	None							
6	BIT	**Malaysia**	3-Mar-79	6-Jul-79	None							
7	BIT	**Pakistan**	12-Mar-81	14-Jun-81	Comprehensive	X						
8	BIT	**China**	29-Mar-82	29-Mar-82	None							
9	BIT	**Sri Lanka**	30-Apr-82	30-Apr-82	Comprehensive	X						
10	BIT	**Yemen**[40]	29-Oct-83	23-Feb-84	[Comprehensive]	[X]						
11	BIT	**Tunisia**	15-Sep-84	13-May-85	Comprehensive	X						
12	BIT	**Hungary**	21-Apr-87	21-Apr-87	Partial	X						
13	BIT	**Poland**	13-Oct-89	4-Jan-90	Partial			X				
14	BIT	**Bolivia**	20-Sep-90	3-Jul-92	Comprehensive			X				
15	BIT	**Morocco**[41]	26-Sep-90	NIF	Comprehensive	X						
16	BIT	**Czech Rep.**	13-Nov-90	23-Sep-91	Comprehensive	X		X				
17	BIT	**Slovakia**	13-Nov-90	23-Sep-91	Comprehensive	X		X				
18	BIT	**Argentina**	22-Nov-91	28-Sep-92	Comprehensive	X		X				
19	BIT	**Latvia**	10-Mar-92	6-Nov-92	Comprehensive	X		X				
20	BIT	**Lithuania**	17-Mar-92	2-Sep-92	Comprehensive	X		X				
21	BIT	**Estonia**	31-Mar-92	20-May-92	Comprehensive	X		X				
22	BIT	**Indonesia**	17-Sep-92	18-Feb-93	Comprehensive	X						
23	BIT	**Chile**	24-May-93	30-Dec-95	Comprehensive	X						
24	BIT	**Vietnam**	8-Sep-93	2-Aug-94	Comprehensive	X		X				
25	BIT	**Bulgaria**	19-Apr-94	1-Apr-95	Partial	X		X				
26	BIT	**Peru**	3-May-94	1-Aug-94	Comprehensive	X						
27	BIT	**Belarus**	20-Dec-94	1-Nov-96	Comprehensive	X						

[39] In the empirical analyses above I have assumed that the 1978 Yugoslav treaty binds Serbia.

[40] Yemen didn't join ICSID until 2004, making its pre-consent ineffective for the study period

[41] The Moroccan BIT provisionally entered into force upon signature, but has never fully entered into force.

28	BIT	**Albania**	31-Mar-95	1-Apr-96	Comprehensive	X						
29	BIT	**Russia**	19-Apr-95	7-Jun-96	Comprehensive			X				
30	BIT	**Oman**	13-Jul-95	6-Jun-96	Comprehensive	X						
31	BIT	**Ukraine**	15-Aug-95	1-Mar-97	Comprehensive	X		X			X	
32	BIT	**South Korea**	30-Aug-95	18-Jun-97	Comprehensive	X						
33	BIT	**Laos**	29-Aug-96	1-Jan-97	Comprehensive	X		X				
34	BIT	**Venezuela**	25-Nov-96	5-Jan-98	Comprehensive	X		X				
35	BIT	**Turkey**	11-Apr-97	8-Oct-98	Comprehensive	X						
36	BIT	**Uruguay**	17-Jun-97	1-Dec-99	Comprehensive	X		X			X	
37	BIT	**Macedonia**	7-May-98	1-Oct-98	Comprehensive	X		X			X	
38	BIT	**South Africa**	25-May-98	1-Jan-99	Comprehensive	X		X				
39	BIT	**Malta**	24-Aug-99	1-Jan-00	Comprehensive	X		X			X	
40	BIT	**Tanzania**	1-Sep-99	1-Mar-02	Comprehensive	X		X				
41	BIT	**Slovenia**	5-Oct-99	12-May-01	Comprehensive	X						
42	BIT	**Kuwait**	7-Nov-99	10-May-02	Comprehensive	X		X				
43	BIT	**UAE**	10-Nov-99	15-Mar-00	Comprehensive	X						
44	BIT	**Thailand**	18-Feb-00	23-Nov-00	Comprehensive	X		X			X	
45	BIT	**India**	4-Jul-00	1-Apr-01	Comprehensive	X		X				
46	BIT	**Mexico**	3-Oct-00	1-Jul-01	Comprehensive			X	X		X	
47	BIT	**Bosnia**[42]	31-Oct-00	1-Jan-02	Comprehensive	X		X			X	
48	BIT	**Croatia**	23-Nov-00	1-Aug-02	Comprehensive	X		X	X		X	
49	BIT	**Uzbekistan**	29-May-01	1-Oct-01	Comprehensive	X		X				
50	BIT	**Ecuador**	30-May-01	1-Mar-02	Comprehensive	X		X				
51	BIT	**Lebanon**	15-Jun-01	2-Nov-01	Comprehensive	X		X			X	

[42] Bosnia's BIT indicates that it was bound by Yugoslavia's 1978 BIT.

Swiss BITs in Force, Through 2002

No.	Type	Host	Signed	In Force	Pre-Consent	Designated Arbitral Fora						
						ICSID	Ad Hoc	UNCITRAL	ICC	SCC	AF	Other
1	BIT	**Tunisia**	2-Dec-61	19-Jan-64	None							
2	FCN	**Niger**	28-Mar-62	17-Nov-62	None							
3	FCN	**Guinea**	26-Apr-62	29-Jul-63	None							
4	FCN	**Côte d'Ivoire**	26-Jun-62	18-Nov-62	None							
5	FCN	**Senegal**	16-Aug-62	13-Aug-64	None							
6	FCN	**Congo**	18-Oct-62	11-Jul-64	None							
7	FCN	**Cameroon**	28-Jan-63	6-Apr-64	None							
8	FCN	**Liberia**	23-Jul-63	22-Sep-64	None							
9	FCN	**Rwanda**	15-Oct-63	15-Oct-63	None							
10	FCN	**Togo**	17-Jan-64	9-Aug-66	None							
11	FCN	**Madagascar**	17-Mar-64	31-Mar-66	None							
12	FCN	**Malta**	20-Jan-65	23-Feb-65	None							
13	BIT	**Tanzania**	3-May-65	16-Sep-65	None							
14	BIT	**Costa Rica**	1-Sep-65	18-Aug-66	None							
15	FCN	**Benin**	20-Apr-66	6-Oct-73	None							
16	FCN	**Chad**	21-Feb-67	31-Oct-67	None							
17	BIT	**Ecuador**	2-May-68	9-Nov-69	None							
18	FCN	**Burkina Faso**	6-May-69	15-Sep-69	None							
19	BIT	**South Korea**	7-Apr-71	7-Apr-71	None							
20	BIT	**Uganda**	23-Aug-71	8-May-72	None							
21	FCN	**Gabon**	28-Jan-72	18-Oct-72	None							
22	BIT	**Zaire**	10-Mar-72	10-May-73	None							
23	FCN	**Cent. African Rep.**	28-Feb-73	4-Jul-73	None							
24	BIT	**Egypt**	25-Jul-73	4-Jun-74	None							
25	BIT	**Indonesia**	6-Feb-74	2-Mar-77	None							
26	BIT	**Sudan**	17-Feb-74	14-Dec-74	None							
27	FCN	**Mauritania**	9-Sep-76	30-May-78	None							
28	BIT	**Jordan**	11-Nov-76	2-Mar-77	None							
29	BIT	**Syria**	22-Jun-77	10-Aug-78	None							
30	BIT	**Malaysia**	1-Mar-78	9-Jun-78	None							
31	BIT	**Singapore**	6-Mar-78	3-May-78	None							

32	BIT	**Mali**	8-Mar-78	8-Dec-78	None							
33	BIT	**Sri Lanka**[43]	23-Sep-81	12-Feb-82	Comprehensive	X						
34	BIT	**Panama**	19-Oct-83	22-Aug-85	Comprehensive			X				
35	BIT	**Morocco**	17-Dec-85	12-Apr-91	None							
36	BIT	**China**	12-Nov-86	18-Mar-87	Partial		X					
37	BIT	**Bolivia**	6-Nov-87	13-May-91	Comprehensive	X	X					
38	BIT	**Turkey**	3-Mar-88	21-Feb-90	Comprehensive	X						
39	BIT	**Hungary**	5-Oct-88	16-May-89	Partial	X						
40	BIT	**Uruguay**	7-Oct-88	22-Apr-91	Comprehensive	X	X					
41	BIT	**Poland**	8-Nov-89	17-Apr-90	Partial	X	X					
42	BIT	**Czech Rep.**	5-Oct-90	7-Aug-91	Comprehensive	X	X					
43	BIT	**Slovakia**	5-Oct-90	7-Aug-91	Comprehensive	X	X					
44	BIT	**Russia**	1-Dec-90	26-Aug-91	Partial		X					
45	BIT	**Jamaica**	11-Dec-90	21-Nov-91	Comprehensive	X						
46	BIT	**Argentina**	12-Apr-91	6-Nov-92	Comprehensive	X		X				
47	BIT	**Ghana**	8-Oct-91	16-Jun-93	Comprehensive	X		X			X	
48	BIT	**Bulgaria**[44]	28-Oct-91	26-Oct-93	Partial/Comp.	[X]		X				
49	BIT	**Cape Verde**	28-Oct-91	6-May-92	Comprehensive	X	X					
50	BIT	**Peru**	22-Nov-91	23-Nov-93	Comprehensive	X		X				
51	BIT	**Paraguay**	31-Jan-92	28-Sep-92	Comprehensive	X		X				
52	BIT	**Vietnam**	3-Jul-92	3-Dec-92	Comprehensive	X		X				
53	BIT	**Albania**	22-Sep-92	30-Apr-93	Comprehensive	X	X					
54	BIT	**Estonia**	21-Dec-92	18-Aug-93	Comprehensive	X	X					
55	BIT	**Latvia**	22-Dec-92	16-Apr-93	Comprehensive	X	X					
56	BIT	**Lithuania**	23-Dec-92	13-May-93	Comprehensive	X	X					
57	BIT	**Uzbekistan**	16-Apr-93	5-Nov-93	Comprehensive	X	X					
58	BIT	**Belarus**	28-May-93	13-Jul-94	Comprehensive	X		X				

[43] The Sri Lankan BIT's comprehensive pre-consent contains important potential ambiguities that may lead a tribunal to refuse to exercise jurisdiction. Schaufelberger, for instance, reads the provision as requiring the further assent of the host state. Peter Schaufelberger, *La protection juridique des investissements internationaux dans les pays en développement: Etude de la garantie contre les risques de l'investissement et an particularier de l'Agence multilatérale de garantie des investissements (AMGI)*, 83 ETUDES SUISSES DE DROIT INTERNATIONAL 92 (1993). My own evaluation suggests that the second paragraph of the investor-state dispute settlement provision allows the investor to unilaterally initiate arbitration after a waiting period of twelve months.

[44] The Bulgarian BIT contains a partial pre-consent to ad hoc arbitration for expropriation-type disputes, but also indicates that once Bulgaria joins ICSID investors shall have the right to initiate ICSID arbitration as to all types of investment disputes. Because Bulgaria ratified the ICSID Convention in 2000, since that time its BIT is best considered to incorporate a comprehensive pre-consent.

59	BIT	**Honduras**	14-Oct-93	31-Aug-98	Comprehensive	X		X	X			
60	BIT	**Romania**	25-Oct-93	30-Jul-94	Comprehensive	X		X				
61	BIT	**Venezuela**	18-Nov-93	30-Nov-94	Comprehensive	X		X				
62	BIT	**Gambia**	22-Nov-93	30-Mar-94	Comprehensive	X						
63	BIT	**Kazakhstan**[45]	12-May-94	13-May-98	[Comprehensive]	[X]						
64	BIT	**Namibia**	1-Aug-94	26-Apr-00	Comprehensive	X						
65	BIT	**Zambia**	3-Aug-94	7-Mar-95	Comprehensive	X						
66	BIT	**El Salvador**	8-Dec-94	16-Sep-96	Comprehensive	X		X				
67	BIT	**Barbados**	29-Mar-95	22-Dec-95	Comprehensive	X						
68	BIT	**Ukraine**	20-Apr-95	21-Jan-97	Comprehensive	X		X				
69	BIT	**South Africa**	27-Jun-95	29-Nov-97	Comprehensive	X		X				
70	BIT	**Mexico**	10-Jul-95	14-Mar-96	Comprehensive	X		X			X	
71	BIT	**Pakistan**	11-Jul-95	6-May-96	Comprehensive	X						
72	BIT	**Slovenia**	9-Nov-95	20-Mar-97	Comprehensive	X		X				
73	BIT	**Moldova**[46]	30-Nov-95	29-Nov-96	[Comprehensive]	[X]						
74	BIT	**Cuba**	28-Jun-96	7-Nov-97	Comprehensive	X		X				
75	BIT	**Zimbabwe**	15-Aug-96	9-Feb-01	Comprehensive	X						
76	BIT	**Macedonia**	26-Sep-96	6-May-97	Comprehensive	X		X				
77	BIT	**Cambodia**	12-Oct-96	28-Mar-00	Comprehensive	X		X				
78	BIT	**Croatia**	30-Oct-96	17-Jun-97	Comprehensive	X						
79	BIT	**Laos**	4-Dec-96	4-Dec-96	Comprehensive	X		X				
80	BIT	**Mongolia**	29-Jan-97	9-Sep-99	Comprehensive	X		X				
81	BIT	**Philippines**	31-Mar-97	23-Apr-99	Comprehensive	X		X				
82	BIT	**India**	4-Apr-97	16-Feb-00	Comprehensive	X		X				
83	BIT	**Thailand**[47]	17-Nov-97	21-Jul-99	None/Prom'y	[X]						
84	BIT	**Iran**	8-Mar-98	1-Nov-01	Comprehensive			X				
85	BIT	**Botswana**	26-Jun-98	13-Apr-00	Comprehensive	X						
86	BIT	**Ethiopia**	26-Jun-98	7-Dec-98	Comprehensive	X		X				
87	BIT	**Kuwait**	31-Oct-98	17-Dec-00	Comprehensive	X		X			X	
88	BIT	**UAE**	3-Nov-98	16-Aug-99	Comprehensive	X		X				
89	BIT	**Armenia**	19-Nov-98	4-Nov-02	Comprehensive	X		X				

[45] Kazakhstan did not ratify the ICSID Convention until 2000, makings its pre-consent ineffective until that time.

[46] Moldova has not ratified the ICSID Convention, making its pre-consent ineffective across the entire period of study.

[47] The Thai BIT indicates that Thailand "shall consent" to investor-initiated arbitration if it has ratified the ICSID Convention, which Thailand has not done.

90	BIT	**Mauritius**	26-Nov-98	21-Apr-00	Comprehensive	X		X				
91	BIT	**Nicaragua**	30-Nov-98	2-May-00	Comprehensive	X						
92	BIT	**North Korea**[48]	14-Dec-98	15-Nov-00	Not Available							
93	BIT	**Chile**	24-Sep-99	2-May-02	Comprehensive	X		X				
94	BIT	**Lebanon**	3-Mar-00	20-Apr-01	Comprehensive	X		X				
95	BIT	**Costa Rica**	1-Aug-00	19-Nov-02	Comprehensive	X		X				
96	BIT	**Bangladesh**	14-Oct-00	3-Sep-01	Comprehensive	X						
97	BIT	**Djibouti**	4-Feb-01	10-Jun-01	Comprehensive	X		X				
98	BIT	**Jordan**[49]	25-Feb-01	11-Dec-01	Not Available							

[48] I was unable to obtain a hard copy of the North Korea BIT. North Korea was not included in the statistical analyses presented in previous chapters due to lack of data for other variables.

[49] I was unable to obtain a hard copy of the Jordanian BIT. In the analyses above I have assumed that the treaty contains a comprehensive pre-consent.

United Kingdom BITs in Force, Through 2002

No.	Type	Host	Signed	In Force	Pre-Consent	Designated Arbitral Fora						
						ICSID	Ad Hoc	UNCITRAL	ICC	SCC	AF	Other
1	FCN	**Cameroon**[50]	29-Jul-63	29-Jul-63	None							
2	BIT	**Egypt**	11-Jun-75	24-Feb-76	Comprehensive	X						
3	BIT	**Singapore**	22-Jul-75	22-Jul-75	Comprehensive	X						
4	BIT	**South Korea**	4-Mar-76	4-Mar-76	Comprehensive	X						
5	BIT	**Romania**	19-Mar-76	22-Nov-76	None							
6	BIT	**Indonesia**	27-Apr-76	24-Mar-77	Promissory							
7	BIT	**Thailand**	28-Nov-78	11-Aug-79	None							
8	BIT	**Jordan**	10-Oct-79	24-Apr-80	Comprehensive	X						
9	BIT	**Sri Lanka**	13-Feb-80	18-Dec-80	Comprehensive	X						
10	BIT	**Senegal**	7-May-80	9-Feb-84	Comprehensive	X						
11	BIT	**Bangladesh**	19-Jun-80	19-Jun-80	Comprehensive	X						
12	BIT	**Philippines**	3-Dec-80	2-Jan-81	Promissory	X						
13	BIT	**Lesotho**	18-Feb-81	18-Feb-81	Comprehensive	X						
14	BIT	**Papua New Guinea**	14-May-81	22-Dec-81	Comprehensive	X						
15	BIT	**Malaysia**	21-May-81	21-Oct-88	Comprehensive	X						
16	BIT	**Paraguay**	4-Jun-81	23-Apr-92	Comprehensive	X						
17	BIT	**Yemen**	25-Feb-82	11-Nov-83	Comprehensive	X						
18	BIT	**Belize**	30-Apr-82	30-Apr-82	Comprehensive			X				
19	BIT	**Cameroon**	4-Jun-82	7-Jun-85	Comprehensive	X						
20	BIT	**Saint Lucia**	18-Jan-83	18-Jan-83	Comprehensive			X				
21	BIT	**Panama**	7-Oct-83	7-Nov-85	Comprehensive			X				
22	BIT	**Haiti**	18-Mar-85	27-Mar-95	Comprehensive			X				
23	BIT	**China**[51]	15-May-86	15-May-86	Partial			X				
24	BIT	**Mauritius**	20-May-86	13-Oct-86	Comprehensive	X						

[50] The UK-Cameroon FCN treaty (actually an "Agreement on Commercial and Economic Cooperation") is very BIT-like in its investment-related provisions. The UK also entered into FCN-type treaties with Nepal, Oman, Iran (1959), and Japan. The Nepal and Oman treaties contain very few investment-related provisions and should not be considered BIT-equivalent treaties. The Iranian treaty is potentially BIT-like, but it never appears to have entered into force.

[51] The UK-China BIT limits its pre-consent to disputes concerning the appropriate level of "compensation." But unlike other Chinese BITs, the UK version does not specify that jurisdiction is limited to disputes over compensation *for expropriation*. This opens up the possibility that China has pre-consented to arbitration involving issues of compensation for breaches of a much wider variety of international legal issues.

25	BIT	**Malta**	4-Oct-86	4-Oct-86	Comprehensive			X				
26	BIT	**Jamaica**	20-Jan-87	14-May-87	Comprehensive	X						
27	BIT	**Dominica**	23-Jan-87	23-Jan-87	Comprehensive			X				
28	BIT	**Hungary**	9-Mar-87	28-Aug-87	Partial	X						
29	BIT	**Antigua-Barbuda**	12-Jun-87	12-Jun-87	Comprehensive			X				
30	BIT	**Benin**	27-Nov-87	27-Nov-87	Comprehensive	X						
31	BIT	**Poland**	8-Dec-87	14-Apr-88	Comprehensive			X				
32	BIT	**Grenada**	25-Feb-88	25-Feb-88	Comprehensive			X				
33	BIT	**Bolivia**	24-May-88	16-Feb-90	Comprehensive			X				
34	BIT	**Tunisia**	14-Mar-89	4-Jan-90	Comprehensive	X						
35	BIT	**Ghana**	22-Mar-89	25-Oct-91	Comprehensive			X				
36	BIT	**Russia**	6-Apr-89	3-Jul-91	Partial			X		X		
37	BIT	**Congo**	25-May-89	9-Nov-90	Comprehensive	X						
38	BIT	**Guyana**	27-Oct-89	11-Apr-90	Comprehensive	X						
39	BIT	**Czech Rep.**	10-Jul-90	26-Oct-92	Partial			X		X		X
40	BIT	**Slovakia**	10-Jul-90	26-Oct-92	Partial			X		X		X
41	BIT	**Burundi**	13-Sep-90	13-Sep-90	Comprehensive	X						
42	BIT	**Morocco**[52]	30-Oct-90	14-Feb-02	Comprehensive	X						
43	BIT	**Argentina**	11-Dec-90	19-Feb-93	Comprehensive	X		X				
44	BIT	**Nigeria**	11-Dec-90	11-Dec-90	Comprehensive	X						
45	BIT	**Turkey**	15-Mar-91	22-Oct-96	Comprehensive	X						
46	BIT	**Mongolia**	4-Oct-91	4-Oct-91	Comprehensive			X				
47	BIT	**Uruguay**[53]	21-Oct-91	1-Aug-97	Comprehensive			X				
48	BIT	**Bahrain**	30-Oct-91	30-Oct-91	Comprehensive			X				
49	BIT	**UAE**	8-Dec-92	15-Dec-93	Comprehensive	X						
50	BIT	**Ukraine**	10-Feb-93	10-Feb-93	Comprehensive			X				
51	BIT	**Nepal**	2-Mar-93	2-Mar-93	Comprehensive	X						
52	BIT	**Barbados**	7-Apr-93	7-Apr-93	Comprehensive	X						
53	BIT	**Lithuania**	17-May-93	21-Sep-93	Comprehensive			X				
54	BIT	**Armenia**	27-May-93	11-Jul-96	Comprehensive	X						

[52] The UK-Morocco BIT entered into force provisionally upon signature. In the statistical analyses above I have used the date of actual entry into force.

[53] The pre-consent in the Uruguayan BIT is limited to arbitral review of domestic court judgments for "manifest injustice" or for "violation" of the BIT. It remains unclear how meaningful this jurisdictional limitation will prove in practice, though it is arguable that it renders the Uruguayan BIT's pre-consent less than "comprehensive".

55	BIT	**Trinidad-Tobago**	23-Jul-93	8-Oct-93	Comprehensive			X				
56	BIT	**Peru**	4-Oct-93	21-Apr-94	Comprehensive	X						
57	BIT	**Uzbekistan**	24-Nov-93	24-Nov-93	Comprehensive			X				
58	BIT	**Honduras**	7-Dec-93	8-Mar-95	Comprehensive			X				
59	BIT	**Tanzania**	7-Jan-94	2-Aug-96	Comprehensive	X						
60	BIT	**Latvia**	24-Jan-94	16-Feb-95	Comprehensive	X						
61	BIT	**Belarus**	1-Mar-94	28-Dec-94	Comprehensive	X						
62	BIT	**India**	14-Mar-94	6-Jan-95	Comprehensive	X		X				
63	BIT	**Albania**	30-Mar-94	30-Aug-95	Comprehensive	X						
64	BIT	**Ecuador**	10-May-94	24-Aug-95	Comprehensive	X						
65	BIT	**Estonia**	12-May-94	16-Dec-94	Comprehensive	X						
66	BIT	**South Africa**	20-Sep-94	27-May-98	Comprehensive			X				
67	BIT	**Pakistan**	30-Nov-94	30-Nov-94	Comprehensive			X				
68	BIT	**Kyrgyzstan**	8-Dec-94	18-Jun-98	Comprehensive			X				
69	BIT	**Cuba**	30-Jan-95	11-May-95	Comprehensive			X	X			
70	BIT	**Turkmenistan**	9-Feb-95	9-Feb-95	Comprehensive			X				
71	BIT	**Georgia**	15-Feb-95	15-Feb-95	Comprehensive	X						
72	BIT	**Venezuela**	15-Mar-95	1-Aug-96	Comprehensive	X						
73	BIT	**Swaziland**	5-May-95	5-May-95	Comprehensive			X				
74	BIT	**Laos**	1-Jun-95	1-Jun-95	Comprehensive			X				
75	BIT	**Côte d'Ivoire**	8-Jun-95	9-Oct-97	Comprehensive	X						
76	BIT	**Romania**	13-Jul-95	10-Jan-96	Comprehensive	X		X			X	
77	BIT	**Kazakhstan**	23-Nov-95	23-Nov-95	Comprehensive			X				
78	BIT	**Oman**	25-Nov-95	21-May-96	Comprehensive			X				
79	BIT	**Bulgaria**	11-Dec-95	24-Jun-97	Partial			X				
80	BIT	**Azerbaijan**	4-Jan-96	11-Dec-96	Comprehensive	X						
81	BIT	**Chile**	8-Jan-96	21-Apr-97	Comprehensive	X						
82	BIT	**Moldova**	19-Mar-96	30-Jul-98	Comprehensive	X						
83	BIT	**Slovenia**	3-Jul-96	27-Mar-99	Comprehensive			X				
84	BIT	**Nicaragua**	4-Dec-96	21-Dec-01	Comprehensive	X						
85	BIT	**Croatia**	11-Mar-97	16-Apr-98	Comprehensive			X				
86	BIT	**Tonga**	22-Oct-97	22-Oct-97	Comprehensive			X				
87	BIT	**Uganda**	24-Apr-98	24-Apr-98	Comprehensive	X						
88	BIT	**Lebanon**	16-Feb-99	16-Sep-01	Comprehensive			X				
89	BIT	**Kenya**	13-Sep-99	13-Sep-99	Comprehensive	X						

90	BIT	**El Salvador**	14-Oct-99	1-Dec-00	Comprehensive	X						
91	BIT	**Sierra Leone**	13-Jan-00	20-Nov-01	Comprehensive	X						
92	BIT	**Vietnam**	1-Aug-02	1-Aug-02	Comprehensive			X				

United States BITs in Force, Through 2002[54]

No.	Type	Host	Signed	In Force	Pre-Consent	Designated Arbitral Fora						
						ICSID	Ad Hoc	UNCITRAL	ICC	SCC	AF	Other
1	FCN	**Ireland**	21-Jan-50	14-Sep-50	None							
2	FCN	**Greece**	3-Aug-51	13-Oct-54	None							
3	FCN	**Israel**	23-Aug-51	3-Apr-54	None							
4	FCN	**Ethiopia**	7-Sep-51	8-Oct-53	None							
5	FCN	**Iran**[55]	15-Aug-55	16-Jun-57	None							
6	FCN	**Nicaragua**[56]	21-Jan-56	24-May-58	None							
7	FCN	**South Korea**	28-Nov-56	7-Nov-57	None							
8	FCN	**Oman**	20-Dec-58	11-Jun-60	None							
9	FCN	**Pakistan**	12-Nov-59	12-Feb-61	None							
10	FCN	**Belgium**	21-Feb-61	3-Oct-63	None							
11	FCN	**Vietnam**[57]	3-Apr-61	30-Nov-61	None							
12	FCN	**Togo**	8-Feb-66	5-Feb-67	None							
13	FCN	**Thailand**	29-May-66	8-Jun-68	None							
14	BIT	**Panama**	27-Oct-82	30-May-91	Comprehensive						X	
15	BIT	**Senegal**	6-Dec-83	25-Oct-90	Comprehensive	X					X	
16	BIT	**Zaire**	3-Aug-84	28-Jul-89	Comprehensive	X					X	
17	BIT	**Morocco**	22-Jul-85	29-May-91	Comprehensive	X						
18	BIT	**Turkey**	3-Dec-85	18-May-90	Comprehensive	X						
19	BIT	**Cameroon**	26-Feb-86	6-Apr-89	Comprehensive	X						
20	BIT	**Egypt**[58]	11-Mar-86	27-Jun-92	Comprehensive	X						
21	BIT	**Bangladesh**	12-Mar-86	25-Jul-89	Comprehensive	X						

[54] The United States table does not include a number of BIT-like FCN treaties between the United States and other "capital-exporting countries" as defined in the study above. These excluded treaties include the following (with year of signature in [brackets]): Italy [1948]; Denmark [1951]; Japan [1953]; Germany [1954]; Netherlands [1956]; France [1959] Belgium-Luxembourg [1961/1962].

[55] The Iranian FCN surprisingly appears to remain in force.

[56] The United States Government denounced the Nicaragua FCN in 1985. *See* Paul Peters & Nico Schrijver, *Latin America and International Regulation of Foreign Investment: Changing Perspectives*, 34 NETHERLANDS INT'L L. REV. 355 (1992).

[57] The Vietnam FCN was concluded with South Vietnam; the United States Department of State says that the FCN's current status—e.g. whether it applies to the modern Democratic Republic of Vietnam—is "under review".

[58] Egypt originally signed a BIT with the United States on 29-sep-1982. This BIT never entered into force, but formed the core of the new US-Egypt BIT signed in 1986.

22	BIT	**Grenada**	2-May-86	3-Mar-89	Comprehensive	X	X					
23	BIT	**Congo**	12-Feb-90	13-Aug-94	Comprehensive	X	X					
24	BIT	**Poland**	21-Mar-90	6-Aug-94	Comprehensive	X		X			X	
25	BIT	**Tunisia**	15-May-90	7-Feb-93	Comprehensive	X						
26	BIT	**Sri Lanka**	20-Sep-91	1-May-93	Comprehensive	X	X					
27	BIT	**Czech Rep.**	22-Oct-91	19-Dec-92	Comprehensive	X		X			X	
28	BIT	**Slovakia**	22-Oct-91	19-Dec-92	Comprehensive	X		X			X	
29	BIT	**Argentina**	31-Mar-92	27-Jan-94	Comprehensive	X		X			X	
30	BIT	**Kazakhstan**	19-May-92	12-Jan-94	Comprehensive	X		X			X	
31	BIT	**Romania**	28-May-92	15-Jan-94	Comprehensive	X		X			X	
32	BIT	**Armenia**	23-Sep-92	29-Mar-96	Comprehensive	X		X			X	
33	BIT	**Bulgaria**	23-Sep-92	2-Jun-94	Comprehensive	X		X			X	
34	FTA	**Mexico**	17-Dec-92	1-Jan-94	Comprehensive	X		X			X	
35	BIT	**Kyrgyzstan**	19-Jan-93	12-Jan-94	Comprehensive	X		X			X	
36	BIT	**Moldova**	21-Apr-93	25-Nov-94	Comprehensive	X		X			X	
37	BIT	**Ecuador**	27-Aug-93	11-May-97	Comprehensive	X		X			X	
38	BIT	**Jamaica**	4-Feb-94	7-Mar-97	Comprehensive	X		X				
39	BIT	**Ukraine**	4-Mar-94	16-Nov-96	Comprehensive	X		X			X	
40	BIT	**Georgia**	7-Mar-94	10-Aug-97	Comprehensive	X		X			X	
41	BIT	**Estonia**	19-Apr-94	16-Feb-97	Comprehensive	X		X			X	
42	BIT	**Trinidad-Tob.**	26-Sep-94	26-Dec-96	Comprehensive	X		X			X	
43	BIT	**Mongolia**	6-Oct-94	4-Jan-97	Comprehensive	X		X			X	
44	BIT	**Albania**	11-Jan-95	4-Jan-98	Comprehensive	X		X			X	
45	BIT	**Latvia**	13-Jan-95	26-Dec-96	Comprehensive	X		X			X	
46	BIT	**Honduras**	1-Jul-95	11-Jul-01	Comprehensive	X		X			X	
47	BIT	**Croatia**	13-Jul-96	20-Jun-01	Comprehensive	X		X			X	
48	BIT	**Azerbaijan**	1-Aug-97	2-Aug-01	Comprehensive	X		X			X	
49	BIT	**Bolivia**	17-Apr-98	6-Jun-01	Comprehensive	X		X			X	
50	BIT	**Bahrain**	29-Sep-99	30-May-01	Comprehensive	X		X			X	

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